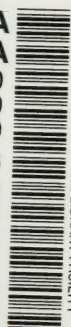


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THE LAW OF CONTRACTS

BY

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Author of Page on Wills].

VOLUME 3

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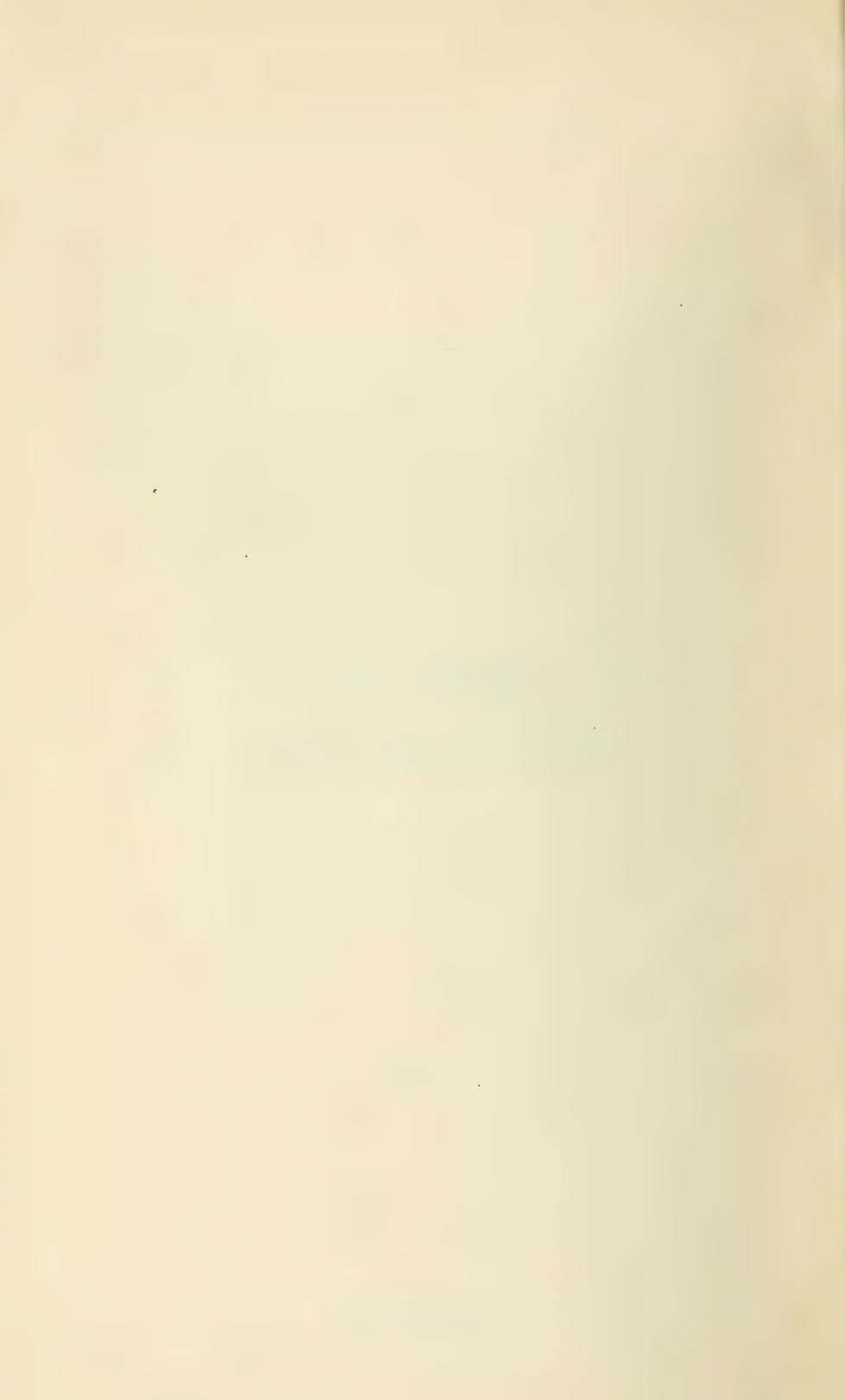
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PART VI.

OPERATION AND EFFECT.

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CHAPTER LVIII.

ASSIGNMENT.

§1255. Definition and nature of assignment.

Assignment of a contract is the transfer by one of the parties thereto to another person not a party thereto of his interest therein. "Assignment" is properly used only of non-negotiable instruments.¹ In discussing the nature and effect of assignment it must be distinguished from novation. If A and B have entered into a contract with each other, and B, without A's consent, transfers his interest in such contract to C, the transaction is an assignment. But if A, B and C enter into a contract whereby B's rights and liabilities are transferred to C in whole or in part, and A releases B from the liabilities thus transferred to C, a new contract is formed and the prior contract is abandoned. This transaction is a novation. An assignment must also be distinguished from a sub-contract. In an assignment by B to C, all B's rights assigned to C pass to C, leaving C to assert such rights against A, B having no interest therein. In a sub-contract B retains all his rights against A, but B makes a contract with C to aid B in performing his contract with A. Such sub-contract does not in the absence of statute give C any rights against A, nor has C any contractual relations with A. A distinction must also be made between a total assignment of all one's rights under a contract and an assignment of a part only of such rights. Assignment by act of the parties, that is by contract, must also be distinguished from the so-called assignment by operation of law. The latter is the title by which contract rights are acquired without the act or consent of their former owner, as by an execu-

¹ *Townsend v. Carpenter*, 11 Ohio 21.

tor or administrator in a decedent's estate, by a trustee in bankruptcy in a bankrupt's estate, by a husband in his wife's property at Common Law and the like.

§1256. Assignment at Common Law.

At Common Law, assignment of contractual rights made by act of the parties was of no effect if the adversary party to the contract thus assigned did not consent thereto.¹ The reason generally assigned for this rule was the same as that underlying champerty: namely, the danger that causes of action might be assigned to great and influential men, and justice might therefor fail.² Even at Common Law there were certain well-recognized exceptions to this rule. Negotiable contracts could be transferred to others than the original parties.³ Contracts running with the land could pass to the grantee of the land. Contracts could be assigned to or by the government.⁴ Under the influence of the doctrines of equity⁵ the Common-Law rule forbidding assignment finally degenerated into a mere rule of pleading. Contracts which were assignable in equity could be sued on at law, but the action had to be brought in the name of the assignor.⁶ The assignor had a right to security against any liability for costs,⁷ but if this were given the assignee had sole control of the action;⁸ and the assignor could not release the

¹ *Lampet's Case*, 10 Coke 46; *Wright v. Williamson*, 3 N. J. L. 520.

² "Right might be trodden down and the weak oppressed." Co. Litt. 214a.

³ This may not be a technical assignment but it had the effect of passing legal title. See § 1290 *et seq.*

⁴ *Breverton's Case*, 1 Dyer 30b; *Stafford v. Buckley*, 2 Ves. 170; *United States v. Buford*, 3 Pet. (U. S.) 12.

⁵ See § 1257.

⁶ *Master v. Miller*, 4 T. R. 320; *New York Guaranty Co. v. Water Co.*, 107 U. S. 205; *Congress Construction Co. v. Libbey Co.*, 199 Ill. 398; 65 N. E. 357; affirming, 101 Ill. App. 279; *Marshall v. Craig*, 3 Bibb (Ky.) 291; *Leach v. Greene*, 116 Mass. 534; *Townsend v. Carpenter*, 11 Ohio 21.

⁷ *Southwick v. Hopkins*, 47 Me. 362; *Fay v. Guynon*, 131 Mass. 31; *Gordon v. Drury*, 20 N. H. 353.

⁸ *Southwick v. Hopkins*, 47 Me. 362.

cause of action,⁹ nor were his declarations against interest admissible when made after assignment.¹⁰

§1257. Assignment in equity.

In equity rights arising under a contract can be assigned, and the assignee may enforce his rights by a suit in equity in his own name.¹ After assignment the assignor could not dismiss the action.² This general rule is subject to certain exceptions and qualifications which can be discussed subsequently with greater economy of space.

§1258. Assignment at Modern Law.

At Modern Law in most jurisdictions a contract may be assigned as well at Common Law as in equity.¹ The qualifications and exceptions to this general rule will be discussed subsequently.² This change from the original Common-Law rule is largely due to statute. The statutes which have this effect may be divided into two classes, one class specifically providing for assignment,³ and the other class providing that actions must be brought in the name of the real party in interest, thus enabling the assignee to sue at law in his own name.⁴ If the statute specifically allows the assignee to sue in his own name this right is not taken away by a provision in the contract providing that the assignee may sue in the name of the assignor.⁵ Even where such statutes are not in effect the assignee's disabilities at Com-

⁹ *Marr v. Hanna*, 7 J. J. Mar. (Ky.) 642; 23 Am. Dec. 449. See § 1272.

¹⁰ *Hough v. Barton*, 20 Vt. 455.

¹ *Brown v. Heathcote*, 1 Atk. 160; *Chandos v. Talbot*, 2 P. Wms. 601; *Chicago, etc., Ry. v. Ry.*, 143 U. S. 596; *Brownell Improvement Co. v. Critchfield*, 197 Ill. 61; 64 N. E. 332; *Dix v. Cobb*, 4 Mass. 508; *Up River Ice Co. v. Denler*, 114 Mich. 296; 68 Am. St. Rep. 480; 72 N. W. 157; *Bleakley v. Nelson*, 56 N. J. Eq. 674; 39 Atl. 912; *Stott v. Franey*, 20 Or. 410; 23 Am. St. Rep.

132; 26 Pac. 271; *Morrison v. Deaderick*, 10 Humph. (Tenn.) 342.

² *Deaver v. Eller*, 7 Ired. (N. C.) 24.

¹ *Dickerson v. Spokane*, 26 Wash. 292; 66 Pac. 381.

² See § 1259 *et seq.*

³ *Wells v. Cody*, 112 Ala. 278; 20 So. 381; *Wright v. Hardy*, 76 Miss. 524; 24 So. 697; *Cleveland v. Heidenheimer*, 92 Tex. 108; 46 S. W. 30.

⁴ *Haupt v. Burton*, 21 Mont. 572; 69 Am. St. Rep. 698; 55 Pac. 110.

⁵ *Gilman v. Controlling Co.*, 180 Mass. 319; 62 N. E. 267.

mon Law are now limited to the necessity of his suing in his assignor's name.⁶

§1259. What contracts can be assigned at Modern Law.

Contracts other than personal contracts, or contracts containing a provision against assignment, or contracts forbidden to be assigned by statute, may be assigned at Modern Law.¹ Thus a contract of guaranty,² or an indemnity bond,³ or a right of action on a bond given by a public contractor to protect material-men,⁴ the beneficial interest under a contract for work and labor,⁵ as wages under a logging contract,⁶ maritime wages,⁷ or an architect's commission,⁸ or the beneficial interest under a contract of sale,⁹ or the benefits under a public contract,¹⁰ or good-will and trade names,¹¹ or valid and reasonable contracts

⁶ See § 1256.

¹ Lemmon v. Strong, 59 Conn. 448; 21 Am. St. Rep. 123; 12 L. R. A. 270; 22 Atl. 293; Savage v. Gregg, 156 Ill. 161; 37 N. E. 312; Rodgers v. Torrent, 111 Mich. 680; 70 N. W. 335; Harbord v. Cooper, 43 Minn. 466; 45 N. W. 860; Knowles v. Frawley, 84 Wis. 119; 54 N. W. 107.

² Lemmon v. Strong, 59 Conn. 448; 21 Am. St. Rep. 123; 12 L. R. A. 270; 22 Atl. 293; Crissey v. Trust Co., 59 Kan. 561; 53 Pac. 867; Owen v. Potter, 115 Mich. 556; 73 N. W. 977.

³ Hoffman v. Smith, 94 Ia. 495; 63 N. W. 182.

⁴ Sepp v. McCann, 47 Minn. 364; 50 N. W. 246; Gilmore v. Westerman, 13 Wash. 390; 43 Pac. 345.

⁵ Taylor v. Hill, 115 Cal. 143; 44 Pac. 336; reversed on other grounds, 115 Cal. 143; 46 Pac. 922 (assignment of wages by an emancipated minor); Bates v. Lumber Co., 50 Minn. 14; 57 N. W. 218.

⁶ Burton v. Gage, 85 Minn. 355; 88 N. W. 997; Maritime wages.

The New Idea, 60 Fed. 294.

⁷ The New Idea, 60 Fed. 294.

⁸ Hooker v. Bank, 30 N. Y. 83; 86 Am. Dec. 351.

⁹ Bank v. Collins, 66 Ark. 240; 50 S. W. 694; La Rue v. Groezinger, 84 Cal. 281; 18 Am. St. Rep. 179; 24 Pac. 42; Mitchell v. Taylor, 27 Or. 377; 41 Pac. 119; Gilmore v. Westerman, 13 Wash. 390; 43 Pac. 345.

¹⁰ National Bank v. Herold, 74 Cal. 603; 5 Am. St. Rep. 476; 16 Pac. 507; Dickerson v. Spokane, 26 Wash. 292; 66 Pac. 381. Street paving contracts. Brownell Improvement Co. v. Critchfield, 197 Ill. 61; 64 N. E. 332; Saxton National Bank v. Carswell, 126 Mo. 436; 29 S. W. 279; Stott v. Franey, 20 Or. 410; 23 Am. St. Rep. 132; 26 Pac. 271. Water contract. Carlyle v. Carlyle, etc., Co., 140 Ill. 445; 29 N. E. 556. Contract to erect heater in public school building. Anniston National Bank v. Durham School Committee, 121 N. C. 107; 28 S. E. 134.

¹¹ Bank v. Warren, 94 Wis. 151;

restraining competition,¹² a contract to buy realty,¹³ or a contract to sell realty and divide the profits therefrom,¹⁴ or a contract creating an easement in a spring,¹⁵ railroad tickets,¹⁶ a non-negotiable note,¹⁷ a running account,¹⁸ checks given by a corporation to its employees, payable in goods at the company store,¹⁹ or an insurance policy after loss,²⁰ or the right to enforce a partnership debt out of the individual property of a partner,²¹ may all be assigned.

§1260. Assignment of contract rights not yet acquired.

The fact that the benefits assigned have not yet accrued, and that the assignor has not performed the contract on his part when he makes the assignment does not prevent the assignment from being valid, at least in equity.¹ Thus a street contractor

68 N. W. 549. But a right to use a trade name unconnected with a business is not assignable. *Thorne-loe v. Hill* (1894), 1 Ch. 569.

¹² *California Steam Nav. Co. v. Wright*, 6 Cal. 259; 65 Am. Dec. 511; *Swanson v. Kirby*, 98 Ga. 586; 26 S. E. 71; *Hedge v. Lowe*, 47 Ia. 137; *Up River Ice Co. v. Denler*, 114 Mich. 296; 68 Am. St. Rep. 480; 72 N. W. 157; *Klein v. Buck*, 73 Miss. 133; 18 So. 891; *Fleckenstein Bros. Co. v. Fleckenstein*, — N. J. Eq. —; 53 Atl. 1043; *Francisco v. Smith*, 143 N. Y. 488; 38 N. E. 980; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; 13 N. E. 419; *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733; 32 L. R. A. 827; 24 S. E. 212. *Contra*, *Hillman v. Shannahan*, 4 Or. 163; 18 Am. Rep. 281.

¹³ *Baker v. Smith* (Ky.), 61 S. W. 1014.

¹⁴ *Dorr v. Alford*, 111 Ia. 278; 82 N. W. 789; *Alden v. Improvement Co.*, 57 Neb. 67; 77 N. W. 369.

¹⁵ *Houston, etc., Ry. v. Cluck*, 31 Tex. Civ. App. 211; 72 S. W. 83.

¹⁶ *Spencer v. Lovejoy*, 96 Ga. 657; 51 Am. St. Rep. 152; 23 S. E. 836; *Nichols v. Pacific Co.*, 23 Or. 123; 37 Am. St. Rep. 664; 18 L. R. A. 55; 31 Pac. 296.

¹⁷ *Sauter v. Leveridge*, 103 Mo. 615; 15 S. W. 981; *Barry v. Wachosky*, 57 Neb. 534; 77 N. W. 1080.

¹⁸ *Knadler v. Sharp*, 36 Ia. 232; *Smalley v. Taylor*, 33 Tex. 668; *Porter v. Young*, 85 Va. 49; 6 S. E. 803.

¹⁹ *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215; 66 S. W. 924; *Bewick Lumber Co. v. Hall*, 94 Ga. 539; 21 S. E. 154.

²⁰ *Star Union Lumber Co. v. Finney*, 35 Neb. 214; 52 N. W. 1113.

²¹ *Wood v. Carter*, — Neb. —; 93 N. W. 158.

¹ *Warren v. Bank*, 149 Ill. 9; 25 L. R. A. 746; 38 N. E. 122; *Knevals v. Blauvelt*, 82 Me. 458; 19 Atl. 818; *State v. Williamson*, 118 Mo. 146; 40 Am. St. Rep. 358; 21 L. R. A. 827; 23 S. W. 1054; *Perkins v. Butler County*, 44 Neb. 110; 62 N. W. 308; *McFarland v. Mfg. Co.*, 53 N. J. Eq. 649; 51 Am. St. Rep. 647;

may assign his interest in warrants to be issued to him.² An employee may assign wages not yet earned under a subsisting contract of employment,³ even if such contract is not for any definite period and is terminable at will.⁴ If the assignment of wages is without limit as to time or amount,⁵ or if made with intent to defraud the creditors of the assignor⁶ the assignment is voidable at the instance of creditors of the assignor. A statute intended to protect attaching creditors which provides that as against attaching creditors an assignment of future earnings shall have no effect unless in writing and recorded, applies to wages and has no application to the assignment of the amount to become due under a contract.⁷ An assignment of wages to be earned under a contract of employment not yet entered into, but which employer and employee then expected to enter into in a short time, has been held valid in equity.⁸ An assignment of wages made before the contract of employment is entered into is void,⁹ even as between assignor and assignee.¹⁰

33 Atl. 962; *Lanigan v. Currier Co.*, 50 N. J. Eq. 201; 24 Atl. 505; *Caulfield v. Van Brunt*, 173 Pa. St. 428; 34 Atl. 230; *Sykes v. Bank*, 2 S. D. 242; 49 N. W. 1058; *National Bank v. Fink*, 86 Tex. 303; 40 Am. St. Rep. 833; 24 S. W. 256; *Stevenson v. Kyle*, 42 W. Va. 229; 57 Am. St. Rep. 854; 24 S. E. 886.

² *Stott v. Franey*, 20 Or. 410; 23 Am. St. Rep. 132; 26 Pac. 271.

³ *Mallin v. Wenham*, 209 Ill. 252; 70 N. E. 564; affirmed, 103 Ill. App. 609; *Metcalf v. Kincaid*, 87 Ia. 443; 43 Am. St. Rep. 391; 54 N. W. 867; *Manly v. Bitzer*, 91 Ky. 596; 34 Am. St. Rep. 242; 16 S. W. 464; *Ouimet v. Sirois*, 124 Mass. 162; *Dolan v. Hughes*, 20 R. I. 513; 40 L. R. A. 735; 40 Atl. 344; *Thayer v. Kelley*, 28 Vt. 19; 65 Am. Dec. 220.

⁴ *Harrop v. Landers, etc., Co.*, 45 Conn. 561; *Metcalf v. Kincaid*, 87 Ia. 443; 43 Am. St. Rep. 391; 54 N. W. 867; *Lannan v. Smith*, 7 Gray (Mass.) 150; *Kane v. Clough*, 36

Mich. 436; 24 Am. Rep. 599; *O'Connor v. Meehan*, 47 Minn. 247; 49 N. W. 982.

⁵ *Steinbach v. Brant*, 79 Minn. 383; 79 Am. St. Rep. 494; 82 N. W. 651.

⁶ *O'Connor v. Meehan*, 47 Minn. 247; 49 N. W. 982; *Dow v. Taylor*, 71 Vt. 337; 76 Am. St. Rep. 775; 45 Atl. 220.

⁷ *Berlin Iron Bridge Co. v. Banking Co.*, 76 Conn. 477; 57 Atl. 275.

⁸ *Edwards v. Peterson*, 80 Me. 367; 6 Am. St. Rep. 207; 14 Atl. 936.

⁹ *Eagan v. Luby*, 133 Mass. 543; *Neuman v. Mining Co.*, 57 Mich. 97; 23 N. W. 600; *Tolman v. Steel Roofing Co.*, 6 Ohio N. P. 467.

¹⁰ *Lehigh Valley R. R. v. Woodring*, 116 Pa. St. 513; 9 Atl. 58. Hence if the debtor pays the assignee over the objection of the assignor, it is still liable to the assignor. In this case there was no time limited within which the as-

Even if a contract of employment is in existence when the assignment is made, yet if it is abandoned thereafter by the assignor,¹¹ or if it expires by efflux of time,¹² and in either case is thereafter renewed, the assignment is ineffectual as to wages earned under such renewal. However, an assignment made before a contract of employment is entered into is upheld in equity as to wages earned under subsequent contracts, if the assignment is on valuable consideration, not in fraud of third persons, and if the rights of third persons have not intervened.¹³ So claims for services not yet rendered,¹⁴ for a building contract not yet performed,¹⁵ or for property sold but not yet delivered,¹⁶ can be assigned in equity. So the right of a mortgagee to securities to be issued thereafter can be assigned.¹⁷ In order to perfect the assignment, however, the fund assigned must come into existence.¹⁸

§1261. Assignment of quasi-contractual rights.

The right to recover money paid under an unenforceable contract can be assigned if it is not purely personal. Thus the right to recover money paid by mistake,¹ or to recover money paid at an erroneous tax sale,² or to recover money lost at gambling,³ or to recover money paid for intoxicating liquor,⁴ may

signed wages were to be earned. The court said: "A man may not sell himself into slavery."

¹¹ O'Keefe v. Allen, 20 R. I. 414; 78 Am. St. Rep. 884; 39 Atl. 752.

¹² Herbert v. Bronson, 125 Mass. 475.

¹³ Jermyn v. Moffitt, 75 Pa. St. 399.

¹⁴ Threshing wheat. Sandwich Mfg. Co. v. Robinson, 83 Ia. 567; 14 L. R. A. 126; 49 N. W. 1031. Hauling wood. Merchants, etc., Bank v. Barnes, 18 Mont. 335; 56 Am. St. Rep. 586; 47 L. R. A. 737; 45 Pac. 218.

¹⁵ Board of Education of Salt Lake City v. Pressed Brick Co., 13 Utah 211; 44 Pac. 709.

¹⁶ Wadhams v. Inman, 38 Or. 143; 63 Pac. 11.

¹⁷ Central Trust Co. v. Improvement Co., 169 N. Y. 314; 62 N. E. 387.

¹⁸ Nebraska Moline Plow Co. v. Fuehring, 60 Neb. 316; 83 N. W. 69.

¹ Lawler v. Jennings, 18 Utah 35; 55 Pac. 60.

² Erickson v. Brookings County, 3 S. D. 434; 18 L. R. A. 347; 53 N. W. 857.

³ Allen v. Dunham, 92 Tenn. 257; 21 S. W. 898.

⁴ Sellers v. Arie, 99 Ia. 515; 68 N. W. 814.

each be assigned. So the right of an insurance company to be subrogated to the rights of a mortgagee to whom the company has paid a loss may be assigned.⁵ A mere personal right cannot be assigned, as a right under Federal Statutes to recover usury paid to a national bank,⁶ or a statutory right to redeem after a foreclosure sale.⁷ The right to have the transfer of certain bonds by the directors of a bank to the president thereof set aside as fraudulent is personal to the bank and not assignable.⁸

§1262. Personal contracts.

If A makes a contract with B by which he contracts for B's personal skill or labor, or reposes special trust in B, B cannot assign such contract without A's consent as long as it is executory on his part.¹ Thus an attorney cannot assign an executory contract whereby he agrees to render professional services,² nor can an abstracter assign a contract employing him to do certain abstracting,³ nor can a publisher assign a contract with an author for publishing a book,⁴ nor can a printer assign a contract to do public printing,⁵ nor can a nurseryman assign a contract whereby he is to prune and care for certain trees,⁶ nor a hemp

⁵ Hare v. Headley, 54 N. J. Eq. 545; 35 Atl. 445.

⁶ Pardoe v. Bank, 106 Ia. 345; 76 N. W. 800.

⁷ Terry v. Allen, 134 Ala. 259; 32 So. 664.

⁸ Smith v. Bank, 137 Cal. 363; 70 Pac. 184.

¹ Burck v. Taylor, 152 U. S. 634; Colton v. Raymond, 114 Fed. 863; 52 C. C. A. 382; Tifton, etc., Ry. v. Bedgood, 116 Ga. 945; 43 S. E. 257; Sloan v. Williams, 138 Ill. 43; 12 L. R. A. 496; 27 N. E. 531; Omaha v. Oil Co., 55 Neb. 337; 75 N. W. 859; Zetterlund v. Texas, etc., Co., 55 Neb. 355; 75 N. W. 860; Poling v. Lumber Co., — W. Va. —; 47 S. E. 279. "You have a right to the benefit you contemplate from the character, credit and substance of

the person with whom you contract." Lord Denman in *Humble v. Hunter*, 12 Q. B. 310, 317.

² Sloan v. Williams, 138 Ill. 43; 12 L. R. A. 496; 27 N. E. 531; *Hilton v. Crooker*, 30 Neb. 707; 47 N. W. 3. The client may treat such attempted assignment as a renunciation of the entire contract. *Hilton v. Crooker*, 30 Neb. 707; 47 N. W. 3.

³ Linn County Abstract Co. v. Beechley, — Ia. —; 99 N. W. 702.

⁴ Griffith v. Publishing Co. (1897), 1 Ch. 21.

⁵ Ellis v. State, 4 Ind. 1; Campbell v. Sumner Co., 64 Kan. 376; 67 Pac. 866.

⁶ Edison v. Babka, 111 Mich. 235; 69 N. W. 499.

grower a contract for the sale of hemp "of his own raising."⁷ So a son cannot assign a contract whereby he has agreed to furnish his father a home and support.⁸ Contracts whereby one party agrees to extend credit to the other cannot be assigned by such other so as to require credit to be extended to the assignee.⁹ So a contract whereby A agrees to allow B to use A's name in business cannot be assigned by B to C.¹⁰ If the contract is fully performed by B, he may assign to C the right to receive compensation from A even if B's services were personal.¹¹ Thus an attorney who has performed all services to be performed under his contract may assign his compensation thereunder.¹² If the person who contracts for the skill, personal labor or credit of another consents to the assignment of such contract by such other, he cannot subsequently object that the contract could not be assigned.¹³ The personal services of the adversary party must be expressly contracted for or necessarily involved in the subject-matter of the contract to prevent assignment. The mere fact that it is believed that the adversary party will perform in person does not prevent assignment.¹⁴ Contracts between the state and an owner of property exempting his property from taxation are personal in their nature and cannot be assigned with such property,¹⁵ unless it appears to

⁷ *Shultz v. Johnson*, 5 B. Mon. (Ky.) 497.

⁸ *Eastman v. Batchelder*, 36 N. H. 141; 72 Am. Dec. 295; *Thomas v. Thomas*, 24 Or. 251; 33 Pac. 565. (Such assignment ends the contract and forfeits the realty granted in consideration thereof.)

⁹ *Arkansas, etc., Co. v. Mining Co.*, 127 U. S. 379; *Sims v. Ice Co.*, 119 Ga. 597; 46 S. E. 841; *Rappleye v. Seeder Co.*, 79 Ia. 220; 7 L. R. A. 139; 44 N. W. 363; *Lansden v. McCarthy*, 45 Mo. 106; *Menger v. Ward*, 87 Tex. 622; 30 S. W. 853.

¹⁰ *Bagby, etc., Co. v. Rivers*, 87 Md. 400; 67 Am. St. Rep. 357; 40 L. R. A. 632; 40 Atl. 171.

¹¹ *Houssels v. Jacobs*, 178 Mo. 579; 77 S. W. 857.

¹² *Taylor v. Mining Co.*, 86 Cal. 589; 25 Pac. 51.

¹³ *Cleveland, etc., Ry. v. Wood*, 189 Ill. 352; 59 N. E. 619; *Weath-erhogg v. Board of Commissioners*, 158 Ind. 14; 62 N. E. 477.

¹⁴ *Horst v. Roehm*, 84 Fed. 565.

¹⁵ *Gulf, etc., Ry. v. Hewes*, 183 U. S. 66; *Mercantile Bank v. Tennessee*, 161 U. S. 161; *Armstrong v. Athens County*, 16 Pet. (U. S.) 281; affirming, 10 Ohio 235; *Yale University v. New Haven*, 71 Conn. 316; 43 L. R. A. 490; 42 Atl. 87; *Lake Shore, etc., Ry. v. Grand Rapids*, 102 Mich. 374; 29 L. R. A. 195; 60 N. W. 767.

be the legislative intention that such right should pass with the property.¹⁶ Where a promise by a vendee of realty whereby he assumes and agrees to pay a mortgage thereon is personal to the vendor and mortgagee the latter cannot assign the benefits thereof.¹⁷

§1263. Specific provision against assignment.

A contract which would otherwise be assignable may be non-assignable without the consent of the adversary party by inserting a clause providing that it shall not be assigned.¹ But under a statute authorizing the assignment of contract rights, the words "not transferable" do not prevent assignment.² Such a provision is intended solely for the benefit of the creditor whose interests may be affected by assignment. If he assents to the assignment, no one can object.³ The original debtor may consent to such assignment, although he has by contract with another relieved himself from liability. Thus an insurance company which has reinsured its risks may consent to the assign-

¹⁶ Louisville, etc., Ry. v. Palmes, 109 U. S. 244; affirming, 19 Fla. 231; Detroit, etc., Ry. v. Common Council, 125 Mich. 673; 84 Am. St. Rep. 589; 85 N. W. 96; 86 N. W. 809; State Board v. Ry., 49 N. J. L. 193; 7 Atl. 826.

¹⁷ Woodcock v. Bostic, 118 N. C. 822; 24 S. E. 362.

¹ Burek v. Taylor, 152 U. S. 634; Delaware County v. Lock Co., 133 U. S. 473; Zetterlund v. Texas, etc., Co., 55 Neb. 355; 75 N. W. 860. Building contracts. Burek v. Taylor, 152 U. S. 634; Mueller v. University, 195 Ill. 236; 88 Am. St. Rep. 194; 63 N. E. 110. Insurance contract. Merrill v. Ins. Co., 169 Mass. 10; 61 Am. St. Rep. 268; 47 N. E. 439; Mutual Life Ins. Co. v. Allen, 138 Mass. 24; 52 Am. Rep. 245; Dube v. Ins. Co., 64 N. H. 527; 1 L. R. A. 57; 15 Atl. 141; Charch v. Charch, 57 O. S. 561; 49 N. E.

408; McQuillan v. Life Association, 112 Wis. 665; 88 Am. St. Rep. 986; 56 L. R. A. 233; 88 N. W. 925; 87 N. W. 1069. Lighting contract. Omaha v. Oil Co., 55 Neb. 337; 75 N. W. 859.

² Bewick Lumber Co. v. Hall, 94 Ga. 539; 21 S. E. 154.

³ Norton v. Whitehead, 84 Cal. 263; 18 Am. St. Rep. 172; 24 Pac. 154; Wilson v. Reuter, 29 Ia. 176; Meyer Brothers v. Gaertner, 106 Ky. 481; *sub nomine*, Louisville Trust Co. v. Gaertner, 45 L. R. A. 513; 50 S. W. 971; Staples v. Somerville, 176 Mass. 237; 57 N. E. 380; Brierly v. Equitable Aid Union, 170 Mass. 218; 64 Am. St. Rep. 297; 48 N. E. 1090; Spencer v. Myers, 150 N. Y. 269; 55 Am. St. Rep. 675; 34 L. R. A. 175; 44 N. E. 942; Fortunato v. Patten, 147 N. Y. 277; 41 N. E. 572.

ment of a policy.⁴ If the debtor receives notice of the assignment without objecting thereto, he thereby consents.⁵ While such provision prevents the assignment of a contract while executory, it does not prevent a party who has performed, from assigning his right to receive compensation,⁶ nor does it prevent an assignment of the right, on breach of such contract, to recover money paid thereunder.⁷ Such provision does not prevent assignment as collateral security.⁸ So a provision in an insurance policy forbidding assignment without proof of insurable interest does not forbid assignment to a creditor not absolutely but merely as collateral security.⁹ If an insurance company issues a policy to the owners of the property insured, loss payable to the mortgagee as his interest may appear, a clause forbidding assignment does not prevent the mortgagee from assigning the debt and his interest under the policy to another.¹⁰ A contract for perpetual insurance, notice of assignment of interest to be given to the company in thirty days after the assignment, "to be entered and allowed," does not give the insurance company the right to forfeit the policy for assignment of which due notice is given unless the character of the assignee is such as to increase the risk, or some other good cause for objecting to the transfer exists.¹¹

§1264. Statutory prohibition of assignment.

In some jurisdictions certain contracts are specifically forbidden to be assigned either at all, or for certain specified purposes. A Federal Statute provides that claims against the

⁴ Faneuil Hall Ins. Co. v. Ins. Co., 153 Mass. 63; 10 L. R. A. 423; 26 N. E. 244.

⁵ Staples v. Somerville, 176 Mass. 237; 57 N. E. 380; Turner v. Wells, 64 N. J. L. 269; 45 Atl. 641; Burnett v. Jersey City, 31 N. J. Eq. 341.

⁶ Bank of Harlem v. Bayonne, 48 N. J. Eq. 246; 21 Atl. 478.

⁷ Shively v. Water Co., 99 Cal. 259; 33 Pac. 848.

⁸ Butler v. Rockwell, 14 Colo. 125; 23 Pac. 462; Crouse v. Mitchell, 130 Mich. 347; 97 Am. St. Rep. 479; 90 N. W. 32.

⁹ Curtiss v. Ins. Co., 90 Cal. 245; 25 Am. St. Rep. 114; 27 Pac. 211.

¹⁰ Whiting v. Burkardt, 178 Mass. 535; 86 Am. St. Rep. 503; 52 L. R. A. 788; 60 N. E. 1.

¹¹ Marshall v. Ins. Co., 176 Pa. St. 628; 34 L. R. A. 159; 35 Atl. 204.

United States cannot be assigned; and that claims against the United States cannot be assigned until a warrant has been given for the claim.¹ While this statute was at first held to make assignments of such contracts invalid, as between the assignor and assignee,² it is now held that the legislative intent was merely to protect the United States and its officers from being compelled to recognize assignments. Accordingly, if the proper Federal officials acquiesce in the assignment no one else has any right to complain.³ Claims against the United States cannot be assigned if the United States does not assent thereto.⁴ So if the United States does not assent, claims due from it cannot be reached by attachment, or by the appointment of a receiver of the particular claim.⁵ Such statute does not apply to a sub-contract made by a government contractor with a third person to enable the farmer to perform his contract with the government,⁶ nor to an assignment by a deputy marshal of his claims against the marshal.⁷ Some statutes forbid assigning a claim to a non-resident to enable him to sue in another state and thus avoid local exemption laws. In the absence of statute this can be done and the debtor has no right of action against the assignor.⁸ So an attachment suit already begun in another state may be assigned to a resident of such state on the debtor's making an assignment in insolvency, and thus an injunction against the prosecution of the attachment suit may be prevented.⁹ Statutes forbidding assignment of claims to residents of other states

¹ R. S. U. S. §§ 3477, 3737.

² *Spofford v. Kirk*, 97 U. S. 484.

³ *Freedman's, etc., Co. v. Shepherd*, 127 U. S. 494; *Hobbs v. McLean*, 117 U. S. 567; *Goodman v. Niblack*, 102 U. S. 556; *Dulaney v. Seudder*, 94 Fed. 6; 36 C. C. A. 52; *Lopey v. United States*, 24 Ct. Cl. 84; 2 L. R. A. 571; *Jernegan v. Osborn*, 155 Mass. 207; 29 N. E. 520; *Fewell v. Surety Co.*, 80 Miss. 782; 92 Am. St. Rep. 625; 28 So. 755; *York v. Conde*, 147 N. Y. 486; 42 N. E. 193.

⁴ *John Shillito Co. v. McClung*,

51 Fed. 868; 2 C. C. A. 526. (Claim for duties.)

⁵ *Howes v. United States*, 24 Ct. Cl. 170; 5 L. R. A. 66.

⁶ *United States v. Farley*, 91 Fed. 474.

⁷ *Wallace v. Douglas*, 116 N. C. 659; 21 S. E. 387. (This not being a claim against the United States.)

⁸ *Horwell v. Sharp*, 85 Ga. 124; 21 Am. St. Rep. 149; 8 L. R. A. 514; 11 S. E. 561.

⁹ *Proctor v. Bank*, 152 Mass. 223; 9 L. R. A. 122; 25 N. E. 81.

to evade exemption laws are valid.¹⁰ They apply to a claim assigned in good faith before the act is passed, but assigned by the assignee to a third person to evade the act.¹¹ They apply to a foreign corporation doing business and extending credit within the state, which sues in another state to enforce its claim.¹² In the absence of statute in the state in which suit is brought such statutes forbidding assignment have no extra-territorial operation. The efficient remedy is either to make such conduct criminal¹³ or to provide that in such cases the debtor may recover from the assignor the amount collected from the debtor by the action in the state to which the debt has been sent for collection.¹⁴

§1265. Partial assignment.

A creditor cannot at law assign a part of his claim against his debtor to a third person so as to subject such debtor to two or more actions instead of one, without the consent of such debtor.¹ This rule is solely for the benefit of the debtor, and is intended to prevent him from being exposed to two separate suits on one contract. Accordingly a partial assignment is valid if it makes assignor and assignee co-owners in the claim assigned, and they both join in one action to enforce the entire

¹⁰ *Sweeny v. Hunter*, 145 Pa. St. 363; 14 L. R. A. 394; 22 Atl. 653.

¹¹ *Bishop v. Middleton*, 43 Neb. 10; 26 L. R. A. 443; 61 N. W. 129.

¹² *Singer Mfg. Co. v. Fleming*, 39 Neb. 679; 42 Am. St. Rep. 613; 58 N. W. 226.

¹³ *State v. Dittmar*, 120 Ind. 34, 388; 22 N. E. 88; 22 N. E. 299.

¹⁴ *Bishop v. Middleton*, 43 Neb. 10; 26 L. R. A. 443; 61 N. W. 129; *O'Connor v. Waltr*, 37 Neb. 267; 40 Am. St. Rep. 486; 23 L. R. A. 650; 55 N. W. 867.

¹ *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; *Kansas City, etc., Ry. v. Robertson*, 109 Ala. 296; 10 So. 432; *Clancy v. Plover*, 107 Cal. 272, 40 Pac. 394; *Henn Ins. Co. v. Ry.*,

19 Colo. 46; 34 Pac. 281; *Welch v. Mayer*, 4 Colo. App. 440; 36 Pac. 613; *Snodden v. Harries*, 5 Colo. App. 477; 39 Pac. 68; *Rivers v. Wright*, 117 Ga. 81; 43 S. E. 499; *Chicago Ry. v. Nichols*, 57 Ill. 464; *German Fire Ins. Co. v. Bullene*, 51 Kan. 764; 33 Pac. 467; *Getchell v. Maney*, 69 Me. 442; *Gibson v. Cooke*, 20 Pick. (Mass.) 15; 32 Am. Dec. 194; *Burnett v. Cranfill*, 67 Mo. 410; *Hopkins v. Washington County*, 56 Neb. 596; 77 N. W. 53; *Stanbery v. Smythe*, 13 O. S. 495; *Dugan v. Knapp*, 105 Wis. 320; 81 N. W. 412; *Cook v. Menasha*, 103 Wis. 6; 79 N. W. 26; *Skobis v. Ferge*, 102 Wis. 122; 78 N. W. 426

claim.² So if the debtor assents to a partial assignment it is as valid as a total assignment would have been. No one can thereafter object to the assignment as partial,³ neither the debtor⁴ nor the assignor⁵ nor the attaching creditors of the assignor.⁶ In equity, however, it is always possible to make all the parties in interest parties to the action and have their rights determined thereby. Accordingly the reason which the Common Law had for prohibiting partial assignments does not exist in equity, and partial assignments are enforced, even if the debtor does not consent thereto.⁷ Neither the debtor,⁸ subsequent assignees,⁹ nor attaching creditors¹⁰ can object in equity to an assignment as partial. Even if separate actions are brought by the several partial assignees, the court may consolidate them and the defendant debtor has no ground of complaint except as to costs made before consolidation.¹¹ Equitable relief is not

² *Evans v. Land & Coal Co.*, 80 Fed. 433; 25 C. C. A. 531; *Schilling v. Mullen*, 55 Minn. 122; 43 Am. St. Rep. 475; 56 N. W. 586; *Whittemore v. Oil Co.*, 124 N. Y. 565; 21 Am. St. Rep. 708; 27 N. E. 244; *Ramsey v. Johnson*, 8 Wyom. 476; 80 Am. St. Rep. 948; 58 Pac. 755.

³ *Methven v. Power Co.*, 66 Fed. 113; 13 C. C. A. 362; *Manchester Ins. Co. v. Glenn*, 13 Ind. App. 365; 55 Am. St. Rep. 225; 40 N. E. 926; 41 N. E. 847; *Des Moines County v. Hinkley*, 62 Ia. 637; 17 N. W. 915; *Lannan v. Smith*, 7 Gray (Mass.) 150; *Grippin v. Benham*, 5 Wash. 589; 32 Pac. 555.

⁴ *Manufacturing Co. v. Price*, 49 W. Va. 432; 38 S. E. 526.

⁵ *Potter v. Banking Co.*, 59 Kan. 455; 53 Pac. 520.

⁶ *Burditt v. Porter*, 63 Vt. 296; 25 Am. St. Rep. 763; 21 Atl. 955.

⁷ *Addison v. Cox*, L. R. 8 Ch. 76; *Trist v. Child*, 21 Wall. (U. S.) 441; *The Emnbank*, 72 Fed. 610; *Grain v. Aldrich*, 38 Cal. 514; 99 Am. Dec. 423; *Rivers v. Wright*, 117 Ga. 81; 43 S. E. 499; *Warren*

v. Bank, 149 Ill. 9; 25 L. R. A. 746; 38 N. E. 122; *Dean v. Ry.*, 53 Minn. 504; 55 N. W. 628; *Lanigan v. Bradley, etc., Co.*, 50 N. J. Eq. 201; 24 Atl. 505; *Chambers v. Lancaster*, 160 N. Y. 342; 54 N. E. 707; *Fairbanks v. Sargent*, 117 N. Y. 320; 6 L. R. A. 475; 22 N. E. 1039; *Robbins v. Klein*, 60 O. S. 199; 54 N. E. 94; *Pittsburg, etc., Ry. v. Volkert*, 58 O. S. 362; 50 N. E. 924; *McDaniel v. Maxwell*, 21 Or. 202; 28 Am. St. Rep. 740; 27 Pac. 952; *Harris County v. Campbell*, 68 Tex. 22; 2 Am. St. Rep. 467; 3 S. W. 243.

⁸ *Pittsburg, etc., Ry. v. Volkert*, 58 O. S. 362; 50 N. E. 924.

⁹ *Fairbank v. Sargent*, 117 N. Y. 320; 6 L. R. A. 475; 22 N. E. 1039.

¹⁰ *Warren v. Bank*, 149 Ill. 9; 25 L. R. A. 746; 38 N. E. 122; *Robbins v. Klein*, 60 O. S. 199; 54 N. E. 94; *McDaniel v. Maxwell*, 21 Or. 202; 28 Am. St. Rep. 740; 27 Pac. 952.

¹¹ *Avery v. Popper*, 92 Tex. 337; 71 Am. St. Rep. 849; 48 S. W. 572.

given, however, if the sole ground therefor is that a partial assignment has been made.¹²

§1266. Assignment does not discharge assignor.

The assignor cannot by assigning the benefits of his contract relieve himself from his liability thereon.¹ Hence the mere fact of assignment cannot be treated as a breach by the assignor.² Thus if an assignee of a lease expressly assumes the obligations and liabilities arising under such lease in consideration of such assignment and thereby makes himself personally liable, his subsequent assignment to another does not discharge such liability.³ If, on the other hand, there has been no assumption of personal liability, assignment of the lease relieves from liability for rent.⁴ In some jurisdictions, however, this rule must be qualified by the statement that the assignor becomes the surety for the assignee and ceases to be liable to the adversary party in the first instance.⁵

§1267. Assignment may impose personal liability on assignee.

The assignee may incur a personal liability to the adversary party to the contract by expressly agreeing in the contract of assignment to perform terms of the contract for which his assignor was originally liable.¹ This is simply a particular example of the broader question whether one for whose benefit a contract is made but who is not a party thereto can enforce it.²

¹² Home Ins. Co. v. Ry., 19 Colo. 46; 34 Pac. 281; Hopkins v. Washington County, 56 Neb. 596; 77 N. W. 53.

¹ Ferguson v. McBean, 91 Cal. 63; 14 L. R. A. 65; 27 Pac. 518; Cutting Packng Co. v. Packers' Exchange, 86 Cal. 574; 21 Am. St. Rep. 63; 10 L. R. A. 369; 25 Pac. 52; Springer v. De Wolf, 194 Ill. 218; 88 Am. St. Rep. 155; 56 L. R. A. 465; 62 N. E. 542.

² Alden v. Improvement Co., 57 Neb. 67; 77 N. W. 369.

³ Springer v. De Wolf, 194 Ill. 218; 88 Am. St. Rep. 155; 56 L. R. A. 465; 62 N. E. 542.

⁴ Consolidated Coal Co. v. Peers, 166 Ill. 361; 38 L. R. A. 624; 46 N. E. 1105.

⁵ See reasoning in Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574; 21 Am. St. Rep. 63; 10 L. R. A. 369; 25 Pac. 52.

¹ Bach v. Mining Co., 16 Mont. 467; 41 Pac. 75.

² See Ch. LX.

Thus an assignee of a lease may become personally liable on its covenants,³ and the assignee of a bid at an execution sale may make himself personally liable thereon.⁴ The mere assignment of a contract for the sale of certain realty made by a vendee in possession who transfers possession to the assignee does not impose any personal liability upon the assignee which the original vendor can enforce.⁵

§1268. Assignment passes all assignor's rights.

The assignee acquires all the rights of his assignor under the contract assigned to him.¹ This rule applies even when the assignee would not have acquired the rights which his assignor has acquired had the assignee instead of the assignor been a party to the original transaction. Thus where B takes a lease from A, and B's lease is prior to X's mechanic's lien because B has no notice thereof, B may assign to C with the same priority even if C has notice.² The assignee of a debt acquires all securities held by his assignor to protect such debt. Thus assignment of a note carries the security of a mortgage on realty.³ Assignment of a security without assigning the debt passes nothing.⁴ So the assignment of a debt passes a note given therefor, held by the assignor at the time of the assignment,⁵ and assignment of a note carries the debt for which it is given.⁶ Thus assignment of a debt carries with it a guaranty of such

³ *Bonetti v. Treat*, 91 Cal. 223; 14 L. R. A. 151; 27 Pac. 612; *Woodland Oil Co. v. Crawford*, 55 O. S. 161; 34 L. R. A. 62; 44 N. E. 1093.

⁴ *Archer v. Archer*, 155 N. Y. 415; 63 Am. St. Rep. 688; 50 N. E. 55.

⁵ *Lisenby v. Newton*, 120 Cal. 571; 65 Am. St. Rep. 203; 52 Pac. 813.

¹ *Walker v. Maddox*, 105 Ga. 253; 31 S. E. 165; *United States Casualty Co. v. Bagley*, 129 Mich. 70; 55 L. R. A. 616; 87 N. W. 1044; *Solinsky v. Bank*, 82 Tex. 244; 17 S. W. 1050; *Wilson v. Sullivan*, 17 Utah 341; 53 Pac. 994.

² *Floete v. Brown*, 104 Ia. 154; 65 Am. St. Rep. 434; 73 N. W. 483.

³ *Batesville Institute v. Kauffman*, 18 Wall. (U. S.) 151; *Hurt v. Wilson*, 38 Cal. 263; *Miller v. Larned*, 103 Ill. 562; *Connecticut Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655; 14 N. E. 586; *Morris v. Bacon*, 123 Mass. 52; 25 Am. Rep. 17.

⁴ *Johnson v. Clarke* (N. J. Eq.), 28 Atl. 558.

⁵ *Van Pelt v. Hurt*, 97 Ga. 660; 25 S. E. 489.

⁶ *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123.

debt.⁷ A person's¹ guaranty cannot be assigned in some jurisdictions.⁸ An unaccepted offer of guaranty cannot be assigned.⁹ So if the assignor refuses performance of the contract with the adversary party the assignee may perform and thereby protect his own rights.¹⁰ An assignment of a laborer's wages due from a corporation gives the assignee the same right as the assignor to recover from the stockholders.¹¹ So an assignee of a note may avail himself of a power of attorney to confess judgment in favor of the holder.¹² An assignee may use the debt assigned as a set-off.¹³ He may interpose the same defenses against a set-off sought to be made against the debt assigned to him as his assignor could have done.¹⁴ So the assignment of a claim carries with it the right to sue in rescission for fraud,¹⁵ or the right to sue to set aside a fraudulent conveyance,¹⁶ though such right of action

⁷ *Lemmon v. Strong*, 59 Conn. 448; 21 Am. St. Rep. 123; 12 L. R. A. 293; 22 Atl. 293; *Anchor Investment Co. v. Kirkpatrick*, 59 Minn. 378; 50 Am. St. Rep. 417; 61 N. W. 29; *Sepp v. McCann*, 47 Minn. 364; 50 N. W. 246; *Woolley v. Moore*, 61 N. J. L. 16; 38 Atl. 758; *Hayden v. Weldon*, 43 N. J. L. 128; 39 Am. Rep. 551; *Stillman v. Northrup*, 109 N. Y. 473; 17 N. E. 379; *Clafin v. Ostrom*, 54 N. Y. 581; *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469; *Tidioute Savings Bank v. Libbey*, 101 Wis. 193; 70 Am. St. Rep. 907; 77 N. W. 182.

⁸ An indorsement. "We hereby guarantee the payment within note," properly signed, was held personal. *Edgerly v. Lawson*, 176 Mass. 551; 51 L. R. A. 432; 57 N. E. 1020.

⁹ *Schoonover v. Osborne*, 108 Ia. 453; 79 N. W. 263.

¹⁰ *Southern Paving Co. v. Chattanooga* (Tenn. Ch. App.), 48 S. W. 92. (Assignee of benefits of a street paving contract may make repairs during the five year period and collect the fund reserved to enforce

such repairs, the assignor having given bond to the assignee to make required repairs.)

¹¹ *Day v. Vinson*, 78 Wis. 198; 10 L. R. A. 205; 47 N. W. 269.

¹² *Snyder v. Critchfield*, 44 Neb. 66; 62 N. W. 306 (under Pennsylvania law).

¹³ *Nix v. Ellis*, 118 Ga. 345; 98 Am. St. Rep. 111; 45 S. E. 404; *Jack v. Klepson*, 196 Pa. St. 187; 79 Am. St. Rep. 699; 46 Atl. 479.

¹⁴ Defense of limitations. *Walker v. Burgess*, 44 W. Va. 399; 67 Am. St. Rep. 775; 30 S. E. 99. Defense that debt was for personal services (painting a picture) and by statute not subject to set-off. *Millington v. Laurer*, 89 Ia. 322; 48 Am. St. Rep. 385; 56 N. W. 533.

¹⁵ *Metropolitan Life Ins. Co. v. Fuller*, 61 Conn. 252; 29 Am. St. Rep. 196; 23 Atl. 193; *National Valley Bank v. Hancock*, 100 Va. 101; 40 S. E. 611.

¹⁶ *Howd v. Breckenridge*, 97 Mich. 65; 56 N. W. 221; *Billingsley v. Clelland*, 41 W. Va. 234; 23 S. E. 812.

could not be assigned apart from such claim. So an assignee has the same right as his assignor to rescind for the fraud of the adversary party and recover on *quantum meruit*.¹⁷ He has the same right as his assignee to recover for breach of the contract.¹⁸ He can recover from agents of his assignor¹⁹ or from public officers²⁰ for misconduct, causing loss of the money due under such contract. So in case of breach the assignee has the same right to recover whatever has been paid in under such contract that his assignor would have had.²¹ If a vendor of realty²² or personalty²³ reserves the legal title until payment in full as security, such security passes to an assignee of the vendor. So an assignment of a warehouse receipt for wheat carries a right of action for a prior conversion of the wheat.²⁴ So an assignment of the purchase money due on the sale of a chattel sold conditionally on acceptance by the purchaser carries the right to the chattel if the purchaser refuses to accept it.²⁵ But an assignment by a mortgagee of a claim for damages for selling mortgaged property on a lien subsequent to the mortgage has been held not to pass a right of action on an indemnity bond, unless the debt and mortgage have been assigned.²⁶ An assignment of a judgment does not carry with it the cause of action on which it is rendered. Hence if it is vacated by appeal²⁷ or if the claim is settled before judgment is rendered²⁸ the assignee takes

¹⁷ Hicks v. Steel, 126 Mich. 408; 85 N. W. 1121.

¹⁸ Abrahamson v. Lamberson, 72 Minn. 308; 75 N. W. 226 (where recovery was had against a vendor of realty for wrongful taking of possession and removal of buildings).

¹⁹ Munson v. Bank, 19 Wash. 125; 52 Pac. 1011 (negligence of a collecting bank to notify indorsers of non-payment).

²⁰ Citizen's National Bank v. Loomis, 100 Ia. 266; 62 Am. St. Rep. 571; 69 N. W. 443 (negligence of officer in levying attachment).

²¹ Malloy v. Malloy, 35 Neb. 224; 52 N. W. 1097.

²² Douglass v. Blount, 95 Tex.

369; 58 L. R. A. 699; 67 S. W. 484.

²³ Ross-Meehan Foundry Co. v. Ice Co., 72 Miss. 608; 18 So. 364; Landigan v. Mayer, 32 Or. 245; 67 Am. St. Rep. 521; 51 Pac. 649.

²⁴ Dolliff v. Robbins, 83 Minn. 498; 85 Am. St. Rep. 466; 86 N. W. 772.

²⁵ Caulfield v. Van Brunt, 173 Pa. St. 428; 34 Atl. 230.

²⁶ Garretson v. Ferrall, 78 Ia. 166; 6 L. R. A. 377; 42 N. W. 637.

²⁷ Bennett v. Lathrop, 71 Conn. 613; 71 Am. St. Rep. 222; 42 Atl. 634.

²⁸ De Graffenreid v. Ry., 66 Ark. 260; 50 S. W. 272.

nothing. So an assignment by a judgment debtor to the judgment creditor of all claim against the debtor's agent on account of damages sustained by them "by reason of said above judgment" does not pass a cause of action against the agent, the judgment being for injuries to the creditor's horse by the negligence of the debtor's agent.²⁹ So the assignment of a judgment has been held not to carry a right of action on an appeal bond unless specially assigned,³⁰ nor a right of action against the clerk of the court for failure to index the judgment so as to make it a lien on the land of the debtor.³¹ Since a common-law lien is a right to keep possession of personal property until a claim due from the owner to a person so keeping possession is satisfied, some authorities hold that such a lien is a personal right, and therefor non-assignable.³² Equitable liens which consist in the right of the holder thereof to priority of payment have been held to be assignable by some authorities,³³ but other courts have held that such liens cannot be assigned.³⁴ Maritime liens are generally held to be assignable,³⁵ as a lien of mariners for wages,³⁶ or a lien for wharfage.³⁷ Statutory liens analogous to Common-Law liens which consist in the right to retain possession of personalty are held by some authorities to be non-assignable.³⁸ Other authorities have held such liens to be assign-

²⁹ Crook v. Gruell, 82 Ia. 736; 47 N. W. 1081.

³⁰ Chilstrom v. Eppinger, 127 Cal. 326; 78 Am. St. Rep. 46; 59 Pac. 696.

³¹ Redmond v. Staton, 116 N. C. 140; 21 S. E. 186.

³² Roberts v. Jacks, 31 Ark. 597; 25 Am. Rep. 584; Lovett v. Brown, 40 N. H. 511; Dewing v. Hutton, 40 W. Va. 521; 21 S. E. 780. *Contra*, Coit v. Waples, 1 Minn. 134; Woodland Co. v. Mendenhall, 82 Minn. 483; 85 N. W. 164.

³³ Vendor's lien. Gessner v. Palmateer, 89 Cal. 89; 13 L. R. A. 187; 24 Pac. 608; 26 Pac. 789; Lagow v. Badollet, 1 Blackf. (Ind.) 416; 12 Am. Dec. 258; Douglass v. Blount,

95 Tex. 369; 58 L. R. A. 699; 67 S. W. 484; Schmertz v. Hammond, 47 W. Va. 527; 35 S. E. 945. *Contra*, that a vendor's lien is personal, and therefore, being non-assignable, does not pass by assignment of the purchase money. Elder v. Jones, 85 Ill. 384; Law v. Butler, 44 Minn. 482; 9 L. R. A. 856; 47 N. W. 53; Hammond v. Peyton, 34 Minn. 529; 27 N. W. 72.

³⁴ Carlton v. Buckner, 28 Ark. 66.

³⁵ The Sarah J. Weed, 2 Lowell (U. S.) 555.

³⁶ The William M. Hoag, 69 Fed. 742.

³⁷ The Shrewsbury, 69 Fed. 1017.

³⁸ Lien of livery stable keeper. Glascock v. Lemp, 26 Ind. App. 175;

able.³⁹ Statutory liens which consist in the right of the holder thereof to priority of payment out of the proceeds of property subject to the lien, and which do not involve merely the right to retain possession of property, may be assigned.⁴⁰ Liens created by express contract as distinguished from those created by the operation of the law are generally held assignable.⁴¹ The mere right to obtain a lien does not pass by assignment.⁴² This rule has been changed in some states by statute, and the right to obtain a lien passes by assignment of the debt.⁴³ The assignee is also entitled to such rights of priority as his assignor enjoyed. Thus where wages of laborers are entitled to preference the assignee of such wages has the same preference.⁴⁴ So the assignee may avail himself of a decree in favor of his assignor, though rendered after the assignment and in a suit to

59 N. E. 342. *Contra*, McPherson First National Bank v. Commission Co., 61 Mo. App. 143.

³⁹ Lien of attorney. Sibley v. Pine County, 31 Minn. 201; 17 N. W. 337.

⁴⁰ Davis v. Bilsland, 18 Wall. (U. S.) 659; Duncan v. Hawn, 104 Cal. 10; 37 Pac. 626; Sibley v. Pine County, 31 Minn. 201; 17 N. W. 337. Logging lien, Casey v. Ault, 4 Wash. 167; 29 Pac. 1048. Mechanic's lien. Davis v. Bilsland, 18 Wall. (U. S.) 659; Clarkson v. Louderback, 36 Fla. 660; 19 So. 887; Murphy v. Adams, 71 Me. 113; 36 Am. Rep. 299; Henry, etc., Co. v. Fisherick, 37 Neb. 207; 55 N. W. 643; Iaege v. Bossieux, 15 Gratt. (Va.) 83; 76 Am. Dec. 189. *Contra*, that mechanics' liens cannot be assigned. Lovett v. Brown, 40 N. H. 511. So by statute. O'Connor v. Ry., 111 Mo. 185; 20 S. W. 16. So before statute. First National Bank of Decorah v. Day, 52 Ia. 680; 3 N. W. 728. Statutory lien for materials furnished for a boat. The Victorian No. 2, 26 Or. 194; 46 Am. St. Rep. 616; 41 Pac. 1103. Tax

lien, Hart v. Tiernan, 59 Conn. 521; 21 Atl. 1007. Lien for assessments. Gill v. Dunham (Cal.), 34 Pac. 68. Lien on threshing machine to secure laborers' wages. Duncan v. Hawn, 104 Cal. 10; 37 Pac. 626.

⁴¹ Law. Paramore v. Nabers, 42 Ia. 659; Macomber v. Parker, 14 Pick. (Mass.) 497. Equity. Ober v. Gallagher, 93 U. S. 199; Payne v. Wilson, 74 N. Y. 348.

⁴² Lien for street paving. Rauer v. Fay, 110 Cal. 361; 42 Pac. 902.

⁴³ Mechanics' lien. Leftwich Lumber Co. v. Savings Association, 104 Ala. 584; 18 So. 48; Kinney v. Ore Co., 58 Minn. 455; 49 Am. St. Rep. 528; 60 N. W. 23; Bank v. School Directors, 91 Wis. 596; 65 N. W. 368. Landlord's lien on crops. Ballard v. Mayfield, 107 Ala. 396; 18 So. 29.

⁴⁴ *In re* Campbell, 102 Fed. 686; Drennen v. Deposit Co., 115 Ala. 592; 66 Am. St. Rep. 72; 39 L. R. A. 623; 23 So. 164; Falconio v. Larsen, 31 Or. 137; 37 L. R. A. 254; 48 Pac. 703; McIlhenny v. Binz, 80 Tex. 1; 26 Am. St. Rep. 705; 13 S. W. 655.

which the assignee was not a party.⁴⁵ Personal remedies for enforcing the contract do not pass by assignment of the contract.⁴⁶

§1269. Assignment passes only assignor's rights against debtor.

The assignee of a contract takes no interest under the assigned contract greater than that which the original party whose interest he takes had therein, at the time when the adversary party to the contract received notice of the assignment,¹ even if the assignee takes for value and without notice.² So if the assignor has no right to a vendor's lien, the assignee has no right thereto.³ So if the assignor by his contract with the adversary parties has dealt with them as members of a limited partnership with himself, his assignee cannot hold them as partners.⁴ Thus all defenses which could be made against the original party to the contract, such as illegality,⁵ can be made against the assignee. So any right of set-off existing in favor of the adversary party

⁴⁵ *Kramer v. Wood* (Tenn. Ch. App.), 52 S. W. 1113.

⁴⁶ Right to distrain goods of tenant. *Hutsell v. Bank*, 102 Ky. 410; 39 L. R. A. 403; 43 S. W. 469.

¹ *Judson v. Corcoran*, 17 How. (U. S.) 612; *Deming v. Ins. Co.*, 78 Fed. 1; *Doherty v. Doe*, 18 Colo. 456; 33 Pac. 165; *Third National Bank v. Ry.*, 114 Ga. 890; 40 S. E. 1016; *Ostertag v. Evans*, 176 Ill. 215; 52 N. E. 255; *Commercial Nat. Bank v. Burch*, 141 Ill. 519; 33 Am. St. Rep. 331; 31 N. E. 420; *Roberts v. Clelland*, 82 Ill. 538; *Peterson v. Ball*, 121 Ia. 544; 97 N. W. 79; *Shambaugh v. Current*, 111 Ia. 121; 82 N. W. 497; *State Trust Co. v. Turner*, 111 Ia. 664; 53 L. R. A. 136; 82 N. W. 1029; *Wing v. Page*, 62 Iowa 87; 11 N. W. 639; 17 N. W. 181; *Gossom v. Sharp*, 7 Dana (Ky.) 140; *Willis v. Twambly*, 13 Mass. 204; *Hooper v. Van Husan*, 105 Mich. 592; 63 N. W. 522; *Warner v. Whittaker*, 6 Mich. 133; 72 Am. Dec. 65; *Lewis v. Holdredge*,

56 Neb. 379; 76 N. W. 890; reversing on other grounds on rehearing, 55 Neb. 173; 75 N. W. 549; modified, 57 Neb. 219; 77 N. W. 656; *Littlefield v. Albany County Bank*, 97 N. Y. 581; *Callanan v. Edwards*, 32 N. Y. 483; *Rayburn v. Hurd*, 20 Or. 229; 25 Pac. 635; *Pittman v. Raysor*, 49 S. C. 469; 27 S. E. 475; *Patterson v. Rabb*, 38 S. C. 138; 19 L. R. A. 831; 17 S. E. 463; *Prim v. McIntosh*, 43 W. Va. 790; 28 S. E. 742.

² *Bruschke v. Wright*, 166 Ill. 183; 57 Am. St. Rep. 125; 46 N. E. 813.

³ *Bell v. Pelt*, 51 Ark. 433; 14 Am. St. Rep. 57; 4 L. R. A. 247; 11 S. W. 684.

⁴ *Egbert v. Kimberly*, 146 Pa. St. 96; 23 Atl. 437.

⁵ *Commercial National Bank v. Burch*, 141 Ill. 519; 33 Am. St. Rep. 331; 31 N. E. 420; *Nester v. Brewing Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894; 24 L. R. A. 247; 29 Atl. 102.

when he receives notice of the assignment can be made against the assignee.⁶ Thus where selling agents had made advances to their vendor in excess of the amount realized by them from the sales after deducting their expenses and compensation, and assign such excess, the vendor may set up the fact that the agents are indebted to him for failure to sell at the highest market price.⁷ So the assignee of a non-negotiable note given for sheep is liable to counterclaim for breach of warranty.⁸ There is, however, a divergence of authority on the question whether the adversary party must show affirmatively that the amount expended by him exceeds the contract price to defeat the right of the assignee, some authorities holding that it is for such adversary party to show that there is nothing due under the contract,⁹ others holding that it is for the assignee to show that in case of breach by the assignor that there is anything due under the contract.¹⁰ Under statutes allowing assignment and permitting set-off existing at the time of the assignment, a set-off arising after assignment and before notice cannot be made.¹¹ If by statute set-off due at the time of the transfer can be made against the assignee's claim when mature a claim mature at the time of the assignment cannot be set off against an assignee who takes before performance.¹² If before assignment the assignor has waived or modified his contract rights, his assignee is bound thereby.¹³ So if the insolvency of the assignor has

⁶ *Brashear v. West*, 7 Pet. (U. S.) 608; *Jennings v. Bank*, 79 Cal. 323; 12 Am. St. Rep. 145; 5 L. R. A. 233; 21 Pac. 852; *Burton v. Willin*, 6 Houst. (Del.) 552; 22 Am. St. Rep. 363; *Northwestern, etc., Bank v. Rauch*, — Ida. —; 66 Pac. 807; *Benson v. Haywood*, 86 Ia. 107; 23 L. R. A. 335; 53 N. W. 85; *First National Bank v. Bank*, 34 Neb. 71; 33 Am. St. Rep. 1618; 15 L. R. A. 386; 51 N. W. 305; *King v. Armstrong*, 50 O. S. 222; 34 N. E. 163; *Nugent v. Allen*, 95 Tenn. 97; 32 S. W. 9.

⁷ *Mackenzie v. Hodgkin*, 126 Cal.

591; 77 Am. St. Rep. 209; 59 Pac. 36.

⁸ *National Bank v. Feeney*, 12 S. D. 156; 76 Am. St. Rep. 594; 80 N. W. 186.

⁹ *Layton v. Davidson*, 144 Pa. St. 145; 22 Atl. 909.

¹⁰ *Beardsley v. Cook*, 143 N. Y. 143; 38 N. E. 109.

¹¹ *Stadler v. Bank*, 22 Mont. 190; 74 Am. St. Rep. 582; 59 Pac. 111.

¹² *Bradley v. Smith*, 98 Mich. 449; 39 Am. St. Rep. 565; 23 L. R. A. 305; 57 N. W. 576.

¹³ *Soukup v. Investment Co.*, 84 Ia. 448; 35 Am. St. Rep. 317; 51 N.

made impossible of performance a contract to secure a loan for him, his assignee takes no rights.¹⁴ If the rights of the assignor cease because of his death, the assignee has no greater right. Thus where A took out an insurance policy in favor of his wife B, and if she died before him, to his children, and A and B assign the policy to X and B dies before A, X takes nothing by the assignment.¹⁵ Defenses on the ground of non-performance of the contract may be interposed against the assignee.¹⁶ If the assignor has abandoned the contract and the adversary party has been obliged to expend an amount equal to or greater than the contract price in completing the contract, the assignee can recover nothing.¹⁷ Thus if the assignor holds the non-negotiable claim solely to secure a debt, his assignee takes it subject to the right of the adversary party to redeem.¹⁸ The debtor may, however, by his representations to the assignee prior to assignment, estop himself from denying the validity of the claim assigned.¹⁹ Thus where A had rendered services for B, trustee, and A assigned his claim to X, B stating that the only question as to A's fee was as to the amount to be fixed by the court, B cannot afterwards claim that A's services were rendered under a contract that he should make no charge therefor.²⁰

W. 167; *Shuttleworth v. Development Co. (Ky.)*, 60 S. W. 534; *Homer v. Shaw*, 177 Mass. 1; 58 N. E. 160; *Hoover v. Bank*, 58 Neb. 420; 78 N. W. 717.

¹⁴ *National Bank v. Security Co.*, 50 Kan. 313; 31 Pac. 1080.

¹⁵ *Brown's Appeal*, 125 Pa. St. 303; 11 Am. St. Rep. 900; 17 Atl. 419.

¹⁶ *Pacific Rolling Mill Co. v. English*, 118 Cal. 123; 50 Pac. 383; *Barber v. Johnson*, 5 App. D. C. 305; *Sargent v. Ry.*, 48 Kan. 672; 29 Pac. 1063; *Chambers v. Lancaster*, 160 N. Y. 342; 54 N. E. 707; *Hazelton Mercantile Co. v. Improvement Co.*, 143 Pa. St. 573; 22 Atl. 906.

¹⁷ *Jenks v. Wells*, 90 Mich. 515; 51 N. W. 636; *Fisken v. Iron Works*,

86 Mich. 199; 49 N. W. 133; rehearing denied, 87 Mich. 591; 49 N. W. 873; *Union Pacific Ry. v. Bank*, 42 Neb. 469; 60 N. W. 886; *People v. Bank*, 159 N. Y. 382; 54 N. E. 35; *Beardsley v. Cook*, 143 N. Y. 143; 38 N. E. 109; *Greene v. Duncan*, 37 S. C. 239; 15 S. E. 956. ¹⁸ *Drake v. Cloonan*, 99 Mich. 121; 41 Am. St. Rep. 586; 57 N. W. 1098.

¹⁹ *Stone v. Hart (Ky.)*, 66 S. W. 191.

²⁰ *Stone v. Hart (Ky.)*, 66 S. W. 191. B's representations here were made after the assignment, but while A was alive and solvent, and he sought to defeat X's claim after A had died and his estate had become insolvent.

§1270. Assignment of property rights.

It may be here briefly noted that a different rule obtains if the contract under which have arisen rights which are sought to be assigned has been so far performed as to pass property rights. Thus if property is obtained by fraud in the inducement, and such contract is so far performed as to pass a title which is at least voidable, a *bona fide* purchaser for value from such fraudulent vendee can hold such property as against the original vendor.¹ The term "*bona fide*" purchaser is used to include a trustee without notice for *bona fide* creditors.² So land transferred by vendee to his father in payment of an actual debt cannot be charged with the amount due from the vendee to co-vendee by reason of false representations as to the price of the land.³ If the property is transferred to one not a *bona fide* purchaser, as to one with notice of the fraud,⁴ or one who aids in such fraud,⁵ or one who does not pay value therefor, as a devisee,⁶ or a judgment creditor,⁷ or an officer who levies on the property, sells it and has the proceeds in his hands,⁸ such person is liable to the defrauded vendor to the extent of the property in his hands. One who is aware of facts which are enough to put him on inquiry whereby he would have discovered the true

¹ Moore v. Recek, 163 Ill. 17; 44 N. E. 868; Bunn v. Schnellbacher, 163 Ill. 328; 45 N. E. 227; Burton v. Perry, 146 Ill. 71; 34 N. E. 60; Moore v. Moore, 112 Ind. 149; 2 Am. St. Rep. 170; 13 N. E. 673; Bank v. Bank, 159 N. Y. 456; 54 N. E. 66; Schwartz v. McCloskey, 156 Pa. St. 258; 27 Atl. 300; Dettra v. Kestner, 147 Pa. 566; 23 Atl. 889; Oberdorfer v. Meyer, 88 Va. 384; 13 S. E. 756.

² Oberdorfer v. Meyer, 88 Va. 384; 13 S. E. 756.

³ Bunn v. Schnellbacher, 163 Ill. 328; 45 N. E. 227.

⁴ Lewis v. Mortgage Co., 94 Ga. 572; 21 S. E. 224; Lillibridge v. Walsh, 97 Mich. 459; 56 N. W. 854; De Arnaud v. Peet, 49 N. J. Eq.

346; 25 Atl. 964; Hofecker v. Pfeil, 193 Pa. St. 288; 44 Atl. 421; Stone v. Oil Co., 188 Pa. St. 602; 41 Atl. 748, 1119; Stone v. Oil Co., 188 Pa. St. 614; 41 Atl. 748; 41 Atl. 1119; Knox v. Earbee (Tex. Civ. App.), 35 S. W. 186. Even if the statutory notice necessary to give notice to *bona fide* purchasers is not filed. Lillibridge v. Walsh, 97 Mich. 459; 56 N. W. 854.

⁵ Horter v. Herndon, 12 Tex. Civ. App. 637; 35 S. W. 80.

⁶ Rhino v. Emery, 72 Fed. 382.

⁷ Hofecker v. Pfeil, 193 Pa. St. 288; 44 Atl. 421.

⁸ Converse v. Sickles, 146 N. Y. 200; 48 Am. St. Rep. 790; 40 N. E. 777.

state of affairs is not a *bona fide* purchaser of property.⁹ as where he knows that the mortgagor is old and infirm, that the mortgage covers his entire property and that the mortgagee is insolvent.¹⁰ If conveyed to one who has notice of the fraud he is liable even if he has sold the property as agent of the vendee and transmitted the proceeds to vendee.¹¹

§1271. Equities of third persons.

Whether in case of successive assignments each by a prior assignee to his assignee, the last assignee takes subject to equities existing between some prior assignor and his assignee is a question upon which there is a conflict of authority. Some authorities hold that the last assignee takes subject to equities existing between a prior assignor and his assignee.¹ Thus where an insurance policy payable to A was assigned by A to B as collateral to secure A's debt to B, and then by B to C as collateral to secure B's debt to C, it was held that C took no greater right in the policy than B had had; and hence if on A's death C collects the policy he must refund to A's estate all in excess of A's debt to B.² Other authorities hold that the last assignee takes free from equities between a prior assignor and his assignee.³ So if over-due notes which have ceased to be negotiable are assigned apparently absolutely, but really as collateral, an assignment by such assignee to a *bona fide* assignee for value passes absolute title.⁴ So a prior assignor cannot recover non-

⁹ Reddin v. Dunn, 2 Colo. App. 518; 31 Pac. 947.

¹⁰ Galbraith v. McLaughlin, 91 Ia. 399; 59 N. W. 338.

¹¹ Morrow Shoe Mfg. Co. v. Shoe Co., 57 Fed. 685; 24 L. R. A. 417; affirmed in 60 Fed. 341.

¹ Sutherland v. Reeve, 151 Ill. 384; 38 N. E. 130; Gillette v. Murphy, 7 Okla. 91; 54 Pac. 413; Westbury v. Simmons, 57 S. C. 467; 35 S. E. 764; Downer v. Bank, 39 Vt. 25.

² Westbury v. Simmons, 57 S. C. 467; 35 S. E. 764.

³ Quebec Bank v. Taggart, 27 Ont. 162; Baker v. Wood, 157 U. S. 212; First National Bank of Bridgeport v. Irrigation District, 107 Cal. 55; 40 Pac. 45; Y. M. C. A. Gymnasium Co. v. Bank, 179 Ill. 599; 70 Am. St. Rep. 135; 46 L. R. A. 753; 54 N. E. 297; Moore v. Moore, 112 Ind. 149; 2 Am. St. Rep. 170; 13 N. E. 673; Williams v. Donnelly, 54 Neb. 193; 74 N. W. 601; Moore v. Bank, 55 N. Y. 41; 41 Am. Rep. 173; overruling Bush v. Lathrop, 22 N. Y. 535.

⁴ Y. M. C. A. Gymnasium Co. v.

negotiable notes from the last assignee on the ground that such prior assignor was induced to assign such notes to an intermediate assignee through fraud.⁵ An assignee for value takes free from latent equities of third persons of which he had no notice.⁶ Thus an assignee of a judgment is not bound by the interest of a mortgagee on the same land as the judgment, the mortgage being defective and therefore not constructive notice, but the assignor having actual notice thereof,⁷ or by the interest of a third person in the notes secured by the mortgage on which the judgment assigned had been rendered, where some of such notes had been assigned to such third person, but on foreclosure he had returned said notes to his assignor for the purpose of the suit and had allowed him to take judgment in his favor on all the notes.⁸

§1272. Necessity of notice of assignment.

The necessity of giving notice of the assignment to the debtor to protect the rights of the assignee depends upon the relation of the parties between whom the question of the validity of the assignment is raised. As between the assignor and assignee such notice need not be given.¹ So as between the assignee and creditors of the assignor who are seeking to attach the assigned debt, notice before attachment is not necessary.² It is sufficient if notice is given in time to enable the debtor to protect himself in

Bank, 179 Ill. 599; 70 Am. St. Rep. 135; 46 L. R. A. 753; 54 N. E. 297.

⁵ Moore v. Moore, 112 Ind. 149; 2 Am. St. Rep. 170; 13 N. E. 673.

⁶ Western Bank v. Bank, 90 Ga. 339; 35 Am. St. Rep. 210; 16 S. E. 942; Yarnell v. Brown, 170 Ill. 362; 62 Am. St. Rep. 380; 48 N. E. 909.

⁷ Yarnell v. Brown, 170 Ill. 362; 62 Am. St. Rep. 380; 48 N. E. 909.

⁸ Western Bank v. Bank, 90 Ga. 339; 35 Am. St. Rep. 210; 16 S. E. 942.

¹ Wakefield v. Martin, 3 Mass. 558; MacDonald v. Kneeland, 5 Minn. 352.

² Young v. Upson, 115 Fed. 192; Walton v. Horkan, 112 Ga. 814; 81 Am. St. Rep. 77; 38 S. E. 105; Chattanooga, etc., Bank v. Steel Co., 87 Ga. 435; 13 S. E. 586; Knight v. Griffey, 161 Ill. 85; 43 N. E. 727; Thayer v. Daniels, 113 Mass. 129; Schoolfield v. Hirsh, 71 Miss. 55; 42 Am. St. Rep. 450; 14 So. 528; State v. Conrow, 19 Mont. 104; 47 Pac. 640; Scott v. Rohman, 43 Neb. 618; 47 Am. St. Rep. 767; 62 N. W. 46; Pollard v. Pollard, 68 N. H. 356; 39 Atl. 329; Meier v. Hess, 23 Or. 599; 32 Pac. 755; Abbott v. Davidson, 18 R. I. 91; 25 Atl. 839.

the proceedings in garnishment.⁷ As between the debtor and the assignee, notice is not necessary to enable the assignee to enforce the contract against the debtor.⁴ But until notice the debtor is justified in treating the assignor as the party in interest, and payment by the debtor to the assignor before notice will discharge the debt in whole or in part.⁵ So payment by the debtor before notice to an officer making proper levy or attaching discharges his liability to the assignee.⁶ Where the assignor has assigned the same claim at different times to different assignees, there are two theories as to which of such assignees has the better right under the assignment. The English rule which is followed in many American states is that the assignee who first gives notice to the debtor has the better right.⁷ In analogy to this rule an order of assignment mailed to the debtor before a receiver of the property of the assignor is appointed, but not received till after such receiver is appointed, is ineffective as against the receiver.⁸ Under such rule, however, if the second assignee in point of time is the first to give notice he must have taken the assignment for value and without notice of the first assignment.⁹ The other theory is that the first assignee in

³ Knight v. Griffey, 161 Ill. 85; 43 N. E. 727; Abbott v. Davidson, 18 R. I. 91; 25 Atl. 839.

⁴ Allyn v. Allyn, 154 Mass. 570; 28 N. E. 779; Board of Education v. Duparquet, 50 N. J. Eq. 234; 24 Atl. 922.

⁵ Vann v. Marbury, 100 Ala. 438; 46 Am. St. Rep. 70; 23 L. R. A. 325; 14 So. 273; Johnson v. Boice, 40 La. Ann. 273; 8 Am. St. Rep. 528; 4 So. 163; Woods v. Ronco, 85 Me. 124; 26 Atl. 1056; Nielsen v. Albert Lee, — Minn. —; 98 N. W. 195, 197; Commonwealth v. Sides, 176 Pa. St. 616; 35 Atl. 136; Willoughby v. Florence, 51 S. C. 462; 29 S. E. 242; Harvin v. Galluchat, 28 S. C. 211; 13 Am. St. Rep. 671; 5 S. E. 359.

⁶ Faber v. Wagner, 10 N. D. 287; 86 N. W. 963.

⁷ Wigram v. Buckley (1894), 3 Ch. 483; Dearle v. Hall, 3 Russ. 1; Laclede Bank v. Schuler, 120 U. S. 511; Methven v. Power Co., 66 Fed. 113; 13 C. C. A. 362; Graham Paper Co. v. Pembroke, 124 Cal. 117; 71 Am. St. Rep. 26; 44 L. R. A. 632; 56 Pac. 627; Newman v. Irwin, 43 La. Ann. 1114; 10 So. 181; Newton v. Newton, 46 Minn. 33; 48 N. W. 450; Enochs-Havis Lumber Co. v. Newcomb, 79 Miss. 462; 30 So. 608; Phillips' Estate (No. 3), 205 Pa. St. 515; 97 Am. St. Rep. 746; 55 Atl. 213.

⁸ Lane v. Magdebury, 81 Wis. 344; 51 N. W. 562.

⁹ Newton v. Newton, 46 Minn. 33; 48 N. W. 450; Phillips' Estate (No. 3), 205 Pa. St. 515; 97 Am. St. Rep. 746; 55 Atl. 213.

point of time has the better right,¹⁰ so that if assignments are made at the same time their priorities are equal, even if one assignee gives notice to the debtor before the others do.¹¹ Under a statute providing that if an assignment is written and filed it shall operate as constructive notice, actual notice to the debtor is sufficient, though the statutory notice is not given.¹²

§1273. Contents of notice.

The notice of assignment given to the debtor must be such as to apprise him of the fact of assignment.¹ If it is vague and uncertain² or if it is in a language unknown to the debtor, and it is taken away by the assignee who tells the debtor that it is a note, which the assignee wishes the debtor to sign,³ it is not sufficient. Mere failure to give the month and date of an order by a depositor on a savings bank does not invalidate the notice.⁴ Mere knowledge that the attorney of the adversary party is to receive a certain per cent of the recovery is not notice that the transaction amounts to an assignment.⁵

§1274. To whom notice should be given.

Notice may be given to the agent through whom his principal has been accustomed to receive notice,¹ even if in the particular case he omits to forward such notice to his principal. Notice to a firm is sufficient if given to the bookkeeper in charge of the store, where the partners are all absent.² If the notice

¹⁰ *Columbia, etc., Co. v. Bank*, — Ky. —; 76 S. W. 156; *Kennedy v. Parke*, 17 N. J. Eq. 415; *Fortunato v. Patten*, 147 N. Y. 277; 41 N. E. 572; *Brander v. Young*, 12 Tex. 332.

¹¹ *Skobis v. Ferge*, 102 Wis. 122; 78 N. W. 426.

¹² *Galveston, etc., Ry. v. Ginther*, 96 Tex. 295; 72 S. W. 166.

¹ *Mueller v. University*, 195 Ill. 236; 88 Am. St. Rep. 194; 63 N. E. 110; *Dale v. Kimpton*, 46 Vt. 76.

² *Mueller v. University*, 195 Ill. 236; 88 Am. St. Rep. 194; 63 N. E. 110.

³ *Crouch v. Muller*, 141 N. Y. 495; 36 N. E. 394.

⁴ *Weld v. Bank*, 158 Mass. 339; 33 N. E. 519.

⁵ *Rose v. Fretz*, 109 Fed. 810.

¹ *Illinois Central Ry. v. Bryant*, 70 Miss. 665; 12 So. 592.

² *May v. Hill*, 14 Mont. 338; 36 Pac. 877.

is actually communicated to the debtor it is sufficient even if given to another person to be communicated.³

§1275. Effect of notice.

After notice of an assignment the debtor is liable to the assignee.¹ Subsequent payment to the assignor,² or to subsequent attaching creditors,² or a subsequent contract with the assignor,⁴ or a settlement with him,⁵ or release from him,⁶ will not protect the debtor as against the assignee. So the debtor cannot set off against the assigned debt subsequent advances made by him to the assignor.⁷ But if the claim assigned is invalid the debtor is not liable to the assignee for a payment made to the assignor to avoid litigation.⁸ However, if notice of assignment is given to a debtor after he has given his check to the assignor, he is not bound to stop the check in order to protect himself from liability to the assignee.⁹

§1276. Effect of assignment for sole purpose of collection.

Whether an assignee who takes the legal title to the contract for the purpose of enforcing it, but does not take the beneficial interest and is to account to his assignor for what he receives

³ *Holt v. Babcock*, 63 Vt. 634; 22 Atl. 459 (where the notice is given to the debtor's wife and is communicated by her to him).

¹ *Liquidation Estate Purchase Co. v. Willoughby* (H. L.) (1898), A. C. 321; *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180; *Schilling v. Mullen*, 55 Minn. 122; 43 Am. St. Rep. 475; 56 N. W. 586; *Beardsley v. Cook*, 154 N. Y. 707; 49 N. E. 126.

² *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180; *Herter v. Goss, etc., Co.*, 57 N. J. L. 42; 30 Atl. 252; *Bank v. Bayonne*, 48 N. J. Eq. 246; 21 Atl. 478; *Beardsley v. Cook*, 154 N. Y. 707; 49 N. E. 126; *Chesapeake Classified Building Association v. Coleman*, 94 Va. 433; 26 S.

E. 843; *Taggart v. Bank*, 12 Wash. 538; 41 Pac. 892.

³ *Ruthven v. Clarke*, 109 Ia. 25; 79 N. W. 454; *Merchants', etc., Bank v. Barnes*, 18 Mont. 335; 56 Am. St. Rep. 586; 47 L. R. A. 737; 45 Pac. 218.

⁴ *Quick v. Colchester*, 30 Ont. 645.

⁵ *McCarthy v. Water Co.*, 110 Cal. 687; 43 Pac. 391; *Ashby v. Winston*, 34 Mo. 311.

⁶ *Webb v. Steele*, 13 N. H. 230.

⁷ *Blakistone v. Bank*, 87 Md. 302; 39 Atl. 855.

⁸ *Beran v. Bank*, 137 N. Y. 450; 33 N. E. 593.

⁹ *Bence v. Shearman*, 67 L. J. N. S. (Ch. Div.) 513.

thereunder can be regarded as an assignee and can sue thereon in his own name, is a question on which the courts differ. Some hold that such an assignee can sue.¹ This rule is based on the theory that as payment to the assignee discharges the debt it is immaterial to the debtor what the real relation between the assignor and the assignee is.² Another reason given therefor is that the assignee is the trustee of an express trust and as such can sue in his own name.³ The assignor cannot, therefore, make a valid subsequent assignment of an account which has already been assigned for collection.⁴ Other courts hold that such an assignee cannot maintain an action in his own name⁵ on the theory that he is not the real party in interest.

§1277. Elements of assignment.

No particular form of words is necessary to assign a contract unless some statute provides therefor. Any language or conduct which shows the intention of the assignor to transfer his interest in the contract to the assignee is sufficient.¹ To constitute an assignment, however, it must be the intention of the assignor to pass control over the contract or the fruits thereof to the

¹ *Comfort v. Betts* (1891), 1 Q. B. 737; *Greig v. Riordan*, 99 Cal. 316; 33 Pac. 913; *Metropolitan Life Ins. Co. v. Fuller*, 61 Conn. 252; 29 Am. St. Rep. 196; 23 Atl. 193; *Kandler v. Sharp*, 36 Ia. 232; *Brown v. Stoerkel*, 74 Mich. 269; 3 L. R. A. 430; 41 N. W. 921; *Jackson v. Sevatson*, 79 Minn. 275; 82 N. W. 634; *Anderson v. Reardon*, 46 Minn. 185; 48 N. W. 777; *Allen v. Brown*, 44 N. Y. 228; *Falconio v. Larsen*, 31 Or. 137; 37 L. R. A. 254; 48 Pac. 703; *Sloan v. Woodward*, 25 Or. 223; 35 Pac. 450; *Citizens' Bank v. Corkings*, 9 S. D. 614; 62 Am. St. Rep. 891; 70 N. W. 1059; *Wines v. Ry.*, 9 Utah, 228; 33 Pac. 1042; *Chase v. Dodge*, 111 Wis. 70; 86 N. W. 548.

² *Chase v. Dodge*, 111 Wis. 70; 86 N. W. 548.

³ *Citizens' Bank v. Corkings*, 9 S. D. 614; 62 Am. St. Rep. 891; 70 N. W. 1059.

⁴ *Works v. Merrit*, 105 Cal. 467; 38 Pac. 1109.

⁵ *Gaffney v. Tammany*, 72 Conn. 701; 46 Atl. 156; *Stewart v. Price*, 64 Kan. 191; 67 Pac. 553; *Waterman v. Merrow*, 94 Me. 237; 47 Atl. 157; *Brown v. Ginn*, 66 O. S. 316; 64 N. E. 123.

¹ *Clarkson v. Louderbach*, 36 Fla. 660; 19 So. 887; *Savage v. Gregg*, 150 Ill. 161; 37 N. E. 312; *Smith v. Meyer*, 84 Minn. 455; 87 N. W. 1122; *Macklin v. Kinealy*, 141 Mo. 113; 41 S. W. 893; *McConaughy v. Bennett*, 50 W. Va. 172; 40 S. E. 540; *Bentley v. Ins. Co.*, 40 W. Va. 729; 23 S. E. 584.

assignee.² A mere agreement to pay out of particular fund which does not give the promisee any right to control the fund or any part of the fund is not an assignment.³ Even a transaction which purports to be an assignment is not such in legal effect if its effect is to leave the assignor in control of the contract assigned.⁴ Thus an agreement by a client to pay his attorney a certain per cent of the amount recovered is not an assignment to the attorney of such per cent of the claim.⁵ If such a contract show an intention on the part of the client to pass an interest in the subject of the litigation to the attorney it operates as an assignment.⁶ So an agreement to deliver a certain number of bonds out of an issue to be made thereafter is not an assignment of any part of such issue.⁷ On the other hand, a transaction whereby one party transfers to another ownership and control of a chose in action amounts to an assignment.⁸ Thus an agreement by a mortgagor who is effecting

² *Smith v. Meyer*, 84 Minn. 455; 87 N. W. 1122; *Weaver v. Roofing Co.*, 57 N. J. Eq. 547; 40 Atl. 858. "To constitute an equitable assignment there must be an assignment or transfer of the fund or some definite portion of it so that the person owing the debt or holding the fund on which the order is drawn can safely pay the order, and is compellable to do so, though forbidden by the drawer." *Hicks v. Brick Co.*, 94 Va. 741, 745; 27 S. E. 596.

³ *Christmas v. Russell*, 14 Wall. (U. S.) 69; *Maier v. Freeman*, 112 Cal. 8; 53 Am. St. Rep. 151; 44 Pac. 357; *Ford v. Garner*, 15 Ind. 298; *People's Bank v. Barbour* (Ky.), 19 S. W. 585; *Morse v. Allen*, 99 Mich. 303; 58 N. W. 327; *Hale v. Dressen* 76 Minn. 183; 78 N. W. 1045; *Atchison County Bank v. Durfee*, 118 Mo. 431; 40 Am. St. Rep. 396; 24 S. W. 133; *Pearce v. Roberts*, 27 Mo. 179; *Phillips v. Hogue*, 63 Neb. 192; 88 N. W. 180; *Fairbanks v. Welshans*, 55 Neb. 362; 75 N. W.

865; *Beran v. Bank*, 137 N. Y. 450; 33 N. E. 593; *Christmas v. Griswold*, 8 Ohio St. 558; *Browning v. Parker*, 17 R. I. 183; 20 Atl. 835.

⁴ *Beran v. Bank*, 137 N. Y. 450; 33 N. E. 593.

⁵ *Hargett v. McCadden*, 107 Ga. 773; 33 S. E. 666; *Story v. Hull*, 143 Ill. 506; 32 N. E. 265; *Tone v. Shankland*, 110 Ia. 525; 81 N. W. 789; *Gillette v. Murphy*, 7 Okla. 91; 54 Pac. 413.

⁶ *Holmes v. Evans*, 129 N. Y. 140; 29 N. E. 233; *Cullers v. May*, 81 Tex. 110; 16 S. W. 813.

⁷ *Cushing v. Chapman*, 115 Fed. 237.

⁸ *Clark v. Iron Co.*, 81 Fed. 310; *Carlyle v. Carlyle, etc., Co.*, 140 Ill. 445; 29 N. E. 556; *Lafferty v. Hall* (Ky.), 44 S. W. 426; *Hurley v. Bendel*, 67 Minn. 41; 69 N. W. 477; *Second National Bank of Grand Forks v. Sproat*, 55 Minn. 14; 56 N. W. 254; *Marsh v. Garney*, 69 N. H. 236; 45 Atl. 745; *Spott's Estate*, 156 Pa. St. 281; 27 Atl. 132;

a new loan to take up a pre-existing mortgage that the subsequent mortgagee shall pay the proceeds directly to the first mortgagee operates as an assignment.⁹ So an agreement between the next of kin that the administrator should make an equal division of the proceeds of a benefit certificate, made before it was known who was the beneficiary, operates as an assignment.¹⁰ So does an arrangement between a mortgagor, his agent and a mortgagee whereby the mortgagor instructs the agent to pay the rents of the mortgaged property to the mortgagee, and the agent opens an account charging himself in favor of the mortgagee for the rent when collected.¹¹ To effect an assignment of a fund, therefore, the fund to be assigned must be identified with sufficient certainty. An order addressed to a debtor ordering payment out of the amount due from him to the drawer is sufficient where there is but one fund thus owing.¹² So an order on a village to pay and "charge the same to our account" on a specified street is sufficient where given by contractors who are to be paid only out of special assessments.¹³ So an assignment of a contractor's interest in assessments on specified lots stated to be owned by a specified person is sufficient, though the assessment is made as against an unknown owner.¹⁴ So a written promise to pay a given person, addressed the city treasurer, is a sufficient assignment of the amount due the promisor.¹⁵ So an order for a certain sum is sufficient as an assignment where only one claim is due from the debtor, the amount of which is substantially that named in the assignment.¹⁶ So a

(Supreme Assembly, etc.) *Good Fellows v. Campbell*, 17 R. I. 402; 13 L. R. A. 601; 22 Atl. 307; *Baillie v. Stephenson*, 95 Wis. 500; 70 N. W. 660.

⁹ *Leonard v. Marshall*, 82 Fed. 396.

¹⁰ (Supreme Assembly, etc.) *Good Fellows v. Campbell*, 17 R. I. 402; 13 L. R. A. 601; 22 Atl. 307.

¹¹ *Baillie v. Stephenson*, 95 Wis. 500; 70 N. W. 660. But in *In re Cleary*, 9 Wash. 605; 38 Pac. 79, a similar transaction was held not

to amount to an assignment of uncollected rents.

¹² *Bank v. Gibson*, 21 Ont. 613; *In re Hanna*, 105 Fed. 587; *Harris County v. Campbell*, 68 Tex. 22; 2 Am. St. Rep. 467; 3 S. W. 243.

¹³ *Dolese v. McDougall*, 182 Ill. 486; 55 N. E. 547.

¹⁴ *Gill v. Dunham* (Cal.), 34 Pac. 68.

¹⁵ *Harlow v. Bartlett*, 96 Me. 294; 52 Atl. 638.

¹⁶ *Jenness v. Wharff*, 87 Me. 307; 32 Atl. 908.

valid partial assignment in equity must indicate the portion of the fund assigned.¹⁷

§1278. Orders as assignments.

An order by a creditor to a debtor to pay to a designated third person a specified fund owing by such debtor to such creditor operates as an assignment of such fund.¹ To effect an assignment, however, the order must indicate a specific fund. An order drawn generally, not indicating any specific fund to be paid to the holder thereof, is not an assignment by the weight of authority.² So an order to a city official to deliver warrants to a specified company is not an assignment of the fund against which such warrants are drawn.³ Accordingly a debt due from the drawee to the drawer may be attached before acceptance, and the attachments will have priority over the order.⁴ But subse-

¹⁷ *Story v. Hull*, 143 Ill. 506; 32 N. E. 265.

¹ *Bank v. Gibson*, 21 Ont. 613; *In re Hanna*, 105 Fed. 587; *United States v. Ferguson*, 78 Fed. 103; *Joyce v. Wing Yet Lung*, 87 Cal. 424; 25 Pac. 545; *Central Nat. Bank v. Spratlen*, 7 Colo. App. 430; 43 Pac. 1048; *Walton v. Harkan*, 112 Ga. 814; 38 S. E. 105; *Metcalf v. Kincaid*, 87 Ia. 443; 43 Am. St. Rep. 391; 54 N. W. 867; *Harlow v. Bartlett*, 96 Me. 294; 52 Atl. 638; *Jenness v. Wharff*, 87 Me. 307; 32 Atl. 908; *Hurley v. Bendel*, 67 Minn. 41; 69 N. W. 477; *Union Iron Works v. Kilgore*, 65 Minn. 497; 67 N. W. 1017; *Griggs v. St. Paul*, 56 Minn. 150; 57 N. W. 461; *Harmon v. Conrow*, 19 Mont. 104; 47 Pac. 640; *Merchants' & M. Nat. Bank v. Barnes*, 18 Mont. 335; 56 Am. St. Rep. 586; 47 L. R. A. 737; 45 Pac. 218; *Robbins v. Klein*, 60 O. S. 199; 54 N. E. 94; *Gillette v. Murphy*, 7 Okla. 91; 54 Pac. 413; *Willard v. Bullen*, 41 Or. 25; 67 Pac. 924; *McDaniel v. Maxwell*, 21 Or. 202; 28 Am. St. Rep. 740; 27

Pac. 952; *Bank v. Rhea County* (Tenn. Ch. App.), 59 S. W. 442; *Chesapeake Classified Building Association v. Coleman*, 94 Va. 433; 26 S. E. 843; *Dickerson v. Spokane*, 26 Wash. 292; 66 Pac. 381; *Dirimple v. Bank*, 91 Wis. 601; 65 N. W. 501.

² *Thomson v. Huggins*, 23 Ont. App. 191; *Cashman v. Harrison*, 90 Cal. 297; 27 Pac. 283; *Hall v. Flanders*, 83 Me. 242; 22 Atl. 158; *Holbrook v. Payne*, 151 Mass. 383; 21 Am. St. Rep. 456; 24 N. E. 210; *Bradley-Currier Co. v. Bernz*, 55 N. J. Eq. 10; 35 Atl. 832; *Commercial National Bank v. Portland*, 37 Or. 33; 60 Pac. 563; 54 Pac. 814; *Jones v. Cunningham*, 4 Tex. Civ. App. 26; 15 S. W. 38; *Harris County v. Campbell*, 68 Tex. 22; 2 Am. St. Rep. 467; 3 S. W. 243.

³ *Commercial National Bank v. Portland*, 37 Or. 33; 60 Pac. 563; 54 Pac. 814.

⁴ *Holbrook v. Payne*, 151 Mass. 383; 21 Am. St. Rep. 456; 24 N. E. 210.

quent verbal agreement of the parties may specify the fund though not specified in the order, and thus constitute an assignment.⁵ An order to pay less than the amount of the debt cannot operate as an assignment at law. An order to pay a certain number of dollars "of any money due or to become due,"⁶ or an order to pay a part of a debt due,⁷ have been held not to be assignments.

§1279. Drafts as assignments.

In accordance with the principles which apply to orders, a draft does not amount to an assignment of a debt owing by the drawer to the drawee as long as it is not accepted, since it does not purport to convey any designated fund.¹ So if the drawee makes an assignment before acceptance the payee has no claim against such assignee.² So if the drawer makes an assignment after giving the draft and before it is presented for payment the funds in the hands of the drawee should be paid to the assignee.³ So if a creditor of the drawer attaches the funds of the drawer in the hands of the drawee before the draft is accepted such creditor obtains priority over the payee.⁴ This rule has been applied where the draft is for the exact amount

⁵ *McDaniel v. Maxwell*, 21 Or. 202; 28 Am. St. Rep. 740; 27 Pac. 952.

⁶ *Nelson v. Bennett Co.*, 31 Wash. 116; 71 Pac. 749.

⁷ *Andrews v. Frierson*, 134 Ala. 626; 33 So. 6.

¹ *Cashman v. Harrison*, 90 Cal. 297; 27 Pac. 283; *Talladega Mercantile Co. v. Robinson, etc., Co.*, 96 Ga. 815; 22 S. E. 1003; *Baer v. English*, 84 Ga. 403; 20 Am. St. Rep. 372; 11 S. E. 453; *Abt v. Savings Bank*, 159 Ill. 467; 50 Am. St. Rep. 175; 42 N. E. 856 (controlled by New York law); *Grammel v. Carmer*, 55 Mich. 201; 54 Am. Rep. 363; 21 N. W. 418; *Lewis v. Bank*, 30 Minn. 134; 14 N. W. 587; *Kim-*

bail v. Donald, 20 Mo. 577; 64 Am. Dec. 209; *Erickson v. Inman*, 34 Or. 44; 54 Pac. 949; *Commonwealth v. Ins. Co.*, 162 Pa. St. 586; 42 Am. St. Rep. 844; 29 Atl. 660; *Akin v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921; 25 L. R. A. 523; 27 S. W. 669.

² *Abt v. Savings Bank*, 159 Ill. 467; 50 Am. St. Rep. 175; 42 N. E. 856. So where a receiver is appointed for the drawee. *Bosworth v. Bank*, 64 Fed. 615; 12 C. C. A. 331.

³ *Covert v. Rhodes*, 48 O. S. 66; 27 N. E. 94.

⁴ *Baer v. English*, 84 Ga. 403; 20 Am. St. Rep. 372; 11 S. E. 453.

of the debt due from the drawee,⁵ or for a less amount,⁶ or where a particular fund has been designated out of which the drawee is to be reimbursed, as long as the draft is payable generally on acceptance by the drawee.⁷

In some jurisdictions it has been held, apparently contrary to the intention of the parties, that a draft for the whole amount due from the drawee to the drawer is an assignment of such fund.⁸ In other jurisdictions a draft for part of the amount due from the drawee to the drawer is an assignment in equity.⁹ By agreement outside the draft the parties may cause it to operate as an assignment to the payee of the funds in the hands of the drawee.¹⁰ Thus a letter asking the drawee to pay to the holder of the draft the amount due to the drawer even if the drawee should not pay the draft is an assignment.¹¹ A direction to the consignee of goods to apply the proceeds to paying a bill of exchange does not effect an assignment unless the bill was negotiated under an agreement that such proceeds should be applied to its payment.¹² If the bill of exchange is accepted,¹³ even if it is drawn on the drawee at his previous request,¹⁴ it effects an assignment of the funds in the hands of the drawee.

§1280. Checks as assignments.

The same principles that apply to bills of exchange apply to bank checks. By the weight of authority an unaccepted check

⁵ *Fulton v. Gesterding*, — Fla. —; 36 So. 56 (decided under the negotiable instruments act).

⁶ *Bush v. Foote*, 58 Miss. 5; 38 Am. Rep. 310.

⁷ *Whitney v. Bank*, 137 Mass. 351; 50 Am. Rep. 316; *Schmittler v. Simon*, 101 N. Y. 554; 54 Am. Rep. 737; 5 N. E. 452.

⁸ *Brady v. Chadbourne*, 68 Minn. 117; 70 N. W. 981; *Nimocks v. Woody*, 97 N. C. 1; 2 Am. St. Rep. 268; 2 S. E. 249.

⁹ *Warren v. Bank*, 149 Ill. 9; 25 L. R. A. 746; 38 N. E. 122.

¹⁰ *Lawrence National Bank v. Kowalsky*, 105 Cal. 41; 38 Pac.

517 (the draft being for the full amount of the debt); *First National Bank v. Steel Co.*, 87 Ga. 435; 13 S. E. 586; *First National Bank v. Ry.*, 52 Ia. 378; 35 Am. Rep. 280; 3 N. W. 395; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83; 17 N. E. 671.

¹¹ *First National Bank v. Steel Co.*, 87 Ga. 435; 13 S. E. 586.

¹² *Shannon v. Wolf*, 173 Ill. 253; 50 N. E. 682.

¹³ *Wells v. Brigham*, 6 Cush. (Mass.) 6; 52 Am. Dec. 750.

¹⁴ *Walcott v. Richman*, 94 Me. 364; 47 Atl. 901.

is not an assignment of the fund in the hands of the drawee.¹ Hence if the bank on which the check is drawn refuses payment the holder of the check cannot maintain an action against the bank even if the bank has in its hands funds of the drawer.² Hence if the drawer becomes insolvent and makes an assignment the funds in the hands of the drawee should be paid to the assignee of the drawer and not to the payee.³ So if before the check is presented a creditor of the drawer brings proceedings in garnishment to which the bank is made a party, such creditor's claim is superior to that of the holder of the check.⁴ Even if the check is given for the exact amount of the deposit it is not an assignment.⁵ Hence cashing indorsed time checks and holding them as vouchers does not amount to an assignment of the claims of the laborers evidenced thereby.⁶ In some jurisdictions, however, a check is held to be an assignment of the money owing from the drawee to the drawer up to the

¹ *Mining Co. v. Brown*, 124 U. S. 385; *Laclede Bank v. Schuler*, 120 U. S. 511; *Donohue-Kelly Banking Co. v. Pacific Co.*, 138 Cal. 183; 94 Am. St. Rep. 28; 71 Pac. 93; *Harrison v. Wright*, 100 Ind. 515; 50 Am. Rep. 805; *Carr v. Bank*, 107 Mass. 45; 9 Am. Rep. 6; *Brennan v. Bank*, 62 Mich. 343; 28 N. W. 881; *Northern Trust Co. v. Rogers*, 60 Minn. 208; 51 Am. St. Rep. 526; 62 N. W. 273; *Cincinnati, etc., R. R. v. Bank*, 54 O. S. 60; 56 Am. St. Rep. 700; 31 L. R. A. 653; 42 N. E. 700; *Bank v. Brewing Co.*, 50 O. S. 151; 40 Am. St. Rep. 660; 33 N. E. 1054; *Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649; 11 Atl. 304; *Akin v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921; 25 L. R. A. 523; 27 S. W. 669; *Commercial Bank v. Chilberg*, 14 Wash. 247; 53 Am. St. Rep. 873; 44 Pac. 264.

² *Washington First National Bank v. Whitman*, 94 U. S. 343; *Carr v. Bank*, 107 Mass. 45; 9 Am. Rep. 6;

Creveling v. Bank, 46 N. J. L. 255; 50 Am. Rep. 417; *First National Bank v. Clark*, 134 N. Y. 368; 17 L. R. A. 580; 32 N. E. 38; *Cincinnati, etc., R. R. v. Bank*, 54 O. S. 60; 56 Am. St. Rep. 700; 31 L. R. A. 653; 42 N. E. 700.

³ *Laclede Bank v. Schuler*, 120 U. S. 511; *Harrison v. Wright*, 100 Ind. 515; 50 Am. Rep. 805; *Akin v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921; 25 L. R. A. 523; 27 S. W. 669.

⁴ *Duncan v. Berlen*, 60 N. Y. 151; *Commercial Bank v. Chilberg*, 14 Wash. 247; 53 Am. St. Rep. 873; 44 Pac. 264.

⁵ Hence drawer's death revokes the check. *Bernard v. Bank*, 43 La. Ann. 50; 12 L. R. A. 302; 8 So. 702. The holder has no right of action against the bank. *First National Bank v. Clark*, 134 N. Y. 368; 17 L. R. A. 580; 32 N. E. 38.

⁶ *United States v. Rundle*, 107 Fed. 227; 52 L. R. A. 505.

amount of the check.⁷ Where this view is entertained the death of the drawer does not revoke the check.⁸ The holder of an unaccepted check has a right to the fund against a creditor of the drawer who attaches after the check is drawn and before it is presented.⁹ So where A had deposited a fund in his own name, the equitable interest of which belonged to B, and A gave B a check for the fund which B indorsed to C, C has a claim to the fund prior to the attaching creditors of B.¹⁰ The holder of the check may maintain an action against the bank if having funds of the drawer in its hands it refuses payment,¹¹ even if the check is drawn for less than the amount of the fund,¹² and if the bank has made an assignment he has the same rights as against the assignee that the drawer would have had.¹³ Even where a check operates as an assignment, the bank may before presentment appropriate the money due the drawer to the payment of a debt due from him to the bank, and such appropriation will be upheld as against the holder of the check,¹⁴ though it has been held that the bank cannot make such appropriation after presentment.¹⁵ If the bank assigns, before payment of

⁷ *Gage Hotel Co. v. Bank*, 171 Ill. 531; 63 Am. St. Rep. 270; 39 L. R. A. 479; 49 N. E. 420; *Niblack v. Bank*, 169 Ill. 517; 61 Am. St. Rep. 203; 39 L. R. A. 159; 48 N. E. 438; *Whitehouse v. Whitehouse*, 90 Me. 468; 60 Am. St. Rep. 278; 38 Atl. 374; *Fonner v. Smith*, 31 Neb. 107; 28 Am. St. Rep. 510; 11 L. R. A. 528; 47 N. W. 632; *Harris County v. Campbell*, 68 Tex. 22; 2 Am. St. Rep. 467; 3 S. W. 243; *Neely v. Bank*, 25 Tex. Civ. App. 513; 61 S. W. 559; *Raesser v. Bank*, 112 Wis. 591; 88 Am. St. Rep. 979; 56 L. R. A. 174; 88 N. W. 618.

⁸ *Raesser v. Bank*, 112 Wis. 591; 88 Am. St. Rep. 979; 56 L. R. A. 174; 88 N. W. 618.

⁹ *Neely v. Bank*, 25 Tex. Civ. App. 513; 61 S. W. 559; *Dillman v. Carlin*, 105 Wis. 14; 76 Am. St. Rep. 902; 80 N. W. 932.

¹⁰ *Hemphill v. Yerkes*, 132 Pa. St. 545; 19 Am. St. Rep. 607; 19 Atl. 342.

¹¹ *Gage Hotel Co. v. Bank*, 171 Ill. 531; 63 Am. St. Rep. 270; 39 L. R. A. 479; 49 N. E. 420; *Lester v. Given*, 8 Bush. (Ky.) 357; *Fogarties v. Bank*, 12 Rich. (S. C.) 518; 78 Am. Dec. 468.

¹² *Fonner v. Smith*, 31 Neb. 107; 28 Am. St. Rep. 510; 11 L. R. A. 528; 47 N. W. 632.

¹³ *Howes v. Blackwell*, 107 N. C. 196; 22 Am. St. Rep. 870; 12 S. E. 245.

¹⁴ *Wyman v. Bank*, 181 Ill. 279; 72 Am. St. Rep. 259; 48 L. R. A. 565; 54 N. E. 946; *Bank v. Trust Co.*, 149 Ill. 343; 23 L. R. A. 611; 36 N. E. 1029.

¹⁵ *Niblack v. Bank*, 169 Ill. 517; 61 Am. St. Rep. 203; 39 L. R. A. 159; 48 N. E. 438.

the check, he has no greater rights than the drawer would have had.¹⁶ Even where a check operates as an assignment a cashier's check evidencing a deposit is a mere change in the form of the evidence of indebtedness and gives no priority to the holder as against a receiver of the bank.¹⁷

§1281. Form of assignment.

Since no particular form of assignment is necessary, a contract may be assigned without a deed, even if it is for the sale of an interest in realty.¹ So interest under sealed contract may be assigned without a sealed assignment.² A deed purporting to convey an interest in a contract operates as an assignment,³ even if invalid as a deed.⁴ So does a mortgage if so intended.⁵ The destruction of a quit-claim deed which operated as an assignment of an interest in a contract for the sale of realty does not defeat the assignment unless the parties intended it as a re-assignment.⁶ After the owner of realty has contracted with one person for its sale, his conveyance to another subject to such contract does not operate as an assignment of the contract.⁷ An assignment may be effected by an instrument under seal.⁸ Rights under a non-negotiable contract may be assigned by a written instrument separate from the contract assigned,⁹ or by an indorsement on the contract assigned,¹⁰ or

¹⁶ *Howes v. Blackwell*, 107 N. C. 196; 22 Am. St. Rep. 870; 12 S. E. 245.

¹⁷ *Clark v. Trust Co.*, 186 Ill. 440; 78 Am. St. Rep. 294; 53 L. R. A. 232; 57 N. E. 1061.

¹ *Fruhauf v. Bendheim*, 127 N. Y. 587; 28 N. E. 417; *Sayre v. Mohney*, 30 Or. 238; 47 Pac. 197.

² *Hoffman v. Smith*, 94 Ia. 495; 63 N. W. 182; *Allen v. Pancoast*, 20 N. J. L. 68.

³ *Brock v. Pearson*, 87 Cal. 581; 25 Pac. 963. (Here the deed purported to convey one-fourth of the land contracted for and was treated as an assignment of one-fourth of the contract.)

⁴ *Marchant v. Morton* (1901), 2

K. B. 829. (Since executed by one partner only, in the partnership name.)

⁵ *Dutton's Estate*, 181 Pa. St. 426; 37 Atl. 582.

⁶ *Brock v. Pearson*, 87 Cal. 581; 25 Pac. 963.

⁷ *O'Brien v. Evans*, 107 Mich. 623; 65 N. W. 571.

⁸ *Wilson v. Kiesel*, 9 Utah 397; 35 Pac. 488.

⁹ *Spring v. Ins. Co.*, 8 Wheat. (U. S.) 268; *Barrett v. Hinckley*, 124 Ill. 32; 7 Am. St. Rep. 331; 14 N. E. 863; *Erickson v. Kelly*, 9 N. D. 12; 81 N. W. 77; *Leonard v. Kebler*, 50 O. S. 444; 34 N. E. 659.

¹⁰ *Williamson v. Yager*, 91 Ky. 282; 34 Am. St. Rep. 184; 15 S. W.

by an oral contract, even if the contract to be assigned is in writing.¹¹ Accordingly an oral assignment is not invalidated either because it is evidenced by a written instrument executed at a later date¹² or because such written assignment, intended to be executed subsequently, is never in fact executed.¹³ If the assignment is in writing and there is no prior valid oral assignment, delivery is essential to its validity.¹⁴ Hence if placed by the assignor in an envelope addressed to the assignee and taken by the assignee while the assignor is unconscious from the effect of poison no delivery exists and the assignment has no effect.¹⁵ Delivery of a written non-negotiable contract or memorandum with intent to assign the same operates as an assignment.¹⁶ It

660; *Brown v. Bank*, 11 Mass. 153; *Kulp v. March*, 181 Pa. St. 627; 59 Am. St. Rep. 687; 37 Atl. 913.

¹¹ *Leonard v. Marshall*, 82 Fed. 396; *Chamberlin v. Gilman*, 10 Colo. 94; 14 Pac. 107; *Perkins v. Peterson*, 2 Colo. App. 242; 29 Pac. 1135; *State v. Tomlinson*, 16 Ind. App. 662; 59 Am. St. Rep. 335; 45 N. E. 1116; *Tone v. Shankland*, 110 Ia. 525; 81 N. W. 789; *Seymour v. Aultman*, 109 Ia. 297; 80 N. W. 401; *Hoffman v. Smith*, 94 Ia. 495; 63 N. W. 182; *Howe v. Jones*, 57 Ia. 130; 8 N. W. 451; 10 N. W. 299; *Moore v. Lowrey*, 25 Ia. 336; 95 Am. Dec. 790; *McCubbin v. Atchinson*, 12 Kan. 166; *Beard v. Sharp* (Ky.), 65 S. W. 810; *Newby v. Hill*, 2 Met. (Ky.) 530; *Porter v. Bullard*, 26 Me. 448; *Jones v. Witter*, 13 Mass. 304; *Harris v. Chamberlain*, 126 Mich. 280; 85 N. W. 728; *Draper v. Fletcher*, 26 Mich. 154; *Sackett v. Montgomery*, 57 Neb. 424; 73 Am. St. Rep. 522; 77 N. W. 1083; *Thompson v. Emery*, 27 N. H. 269; *Hutchinson v. Low*, 13 N. J. L. 246; *Roberts v. Bank*, 8 N. D. 474; 79 N. W. 993; *Jones v. Reynolds*, 120 N. Y. 213; 24 N. E. 279; *Hooker v. Eagle Bank*, 30 N. Y. 83; 86 Am. Dec. 351; *Risley v.*

Phenix Bank, 83 N. Y. 318; 38 Am. Rep. 421; *Barron v. Williams*, 58 S. C. 280; 79 Am. St. Rep. 840; 36 S. E. 561; *Miller v. Newell*, 20 S. C. 123; 47 Am. Rep. 833; *Cook v. Shute*, *Cook* (Tenn.) 67; *Rollison v. Hope*, 18 Tex. 446; *Hackett v. Moxley*, 65 Vt. 71; 25 Atl. 898; *Seattle National Bank v. Emmons*, 16 Wash. 585; 48 Pac. 262; *Wilt v. Huffman*, 46 W. Va. 473; 33 S. E. 279; *Bentley v. Ins. Co.*, 40 W. Va. 729; 23 S. E. 584.

¹² *Roberts v. Bank*, 8 N. D. 474; 79 N. W. 993.

¹³ *Kenneweg v. Schilansky*, 45 W. Va. 521; 31 S. E. 949.

¹⁴ *Erickson v. Kelly*, 9 N. D. 12; 81 N. W. 77; *Leonard v. Kebler*, 50 O. S. 444; 34 N. E. 659. But see *Kulp v. Marsh*, 181 Pa. St. 627; 59 Am. St. Rep. 687; 37 Atl. 913, where an assignment was held valid though not delivered, but written on the insurance contract to be assigned. And see to the same effect *Williamson v. Yager*, 91 Ky. 282; 34 Am. St. Rep. 184; 15 S. W. 660.

¹⁵ *Leonard v. Kebler*, 50 O. S. 444; 34 N. E. 659.

¹⁶ *Coupons*. *Tyndale v. Randall*, 154 Mass. 103; 27 N. E. 882. *Time check*. *Citizens' State Bank v.*

has been said, however, that the mere indorsement and delivery of a non-negotiable note does not of itself amount to an assignment.¹⁷ A building contractor's marking a bill "approved," rendered for material furnished for the building, is not an assignment of so much of the contract price as is sufficient to pay such bill.¹⁸ A power of attorney to collect a debt is not of itself an assignment,¹⁹ but it may be a means of effecting an assignment if such is the intention of the parties,²⁰ as where the attorney is to retain the amount owed him by the principal.²¹ If A is indebted to B, and C pays A's debt to B under contract with B to assign to C A's indebtedness, such contract operates as an assignment at least in equity.²² But if C makes such payment as a loan to A, and without any contract for an assignment with either A or B, no assignment exists.²³ Discounting a draft with a bill of lading attached gives a qualified interest in the bill of lading which becomes absolute if the drawee does not accept the draft.²⁴ But until the draft is paid

Bonness, 76 Minn. 45; 78 N. W. 875. Insurance policy. *Hanchey v. Hurley*, 129 Ala. 306; 30 So. 742; *Hani v. Ins. Co.*, 197 Pa. St. 276; 80 Am. St. Rep. 819; 47 Atl. 200; *Bentley v. Ins. Co.*, 40 W. Va. 729; 23 S. E. 584. Chattel mortgage. *Hodges v. Wilkinson*, 111 N. C. 56; 17 L. R. A. 545; 15 S. E. 941 (assignment indorsed on margin). Account book. *Preston v. Peterson*, 107 Ia. 244; 77 N. W. 864; *Risley v. Phenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421.

¹⁷ *Chicago, etc., Bank v. Trust Co.*, 190 Ill. 404; 83 Am. St. Rep. 138; 60 N. E. 586.

¹⁸ *Flaherty v. Lumber Co.*, 58 N. J. Eq. 467; 44 Atl. 186.

¹⁹ *Rogers v. Lindsey*, 13 How. (U. S.) 441; *Halliburton v. Nance*, 40 Ark. 161; *Watson v. Philadelphia*, 142 Pa. St. 179; 21 Atl. 815 (hence the debtor can set-off damages for a breach by the principal of another contract).

²⁰ *Murphy v. Bordwell*, 83 Minn. 54; 52 L. R. A. 849; 85 N. W. 915; *National Bank v. Trust Co.*, 17 App. D. C. 112.

²¹ *Key's Estate*, 137 Pa. St. 565; 21 Am. St. Rep. 896; 20 Atl. 710.

²² *Crumlish v. Improvement Co.*, 38 W. Va. 390; 45 Am. St. Rep. 872; 23 L. R. A. 120; 18 S. E. 456.

²³ *United States v. Rundle*, 107 Fed. 227; 52 L. R. A. 505; *Bartholomew v. Bank*, 57 Kan. 594; 47 Pac. 519; *Crumlish v. Improvement Co.*, 38 W. Va. 390; 45 Am. St. Rep. 872; 23 L. R. A. 120; 18 S. E. 456.

²⁴ *American National Bank v. Henderson*, 123 Ala. 612; 82 Am. St. Rep. 147; 26 So. 498; *Hathaway v. Haynes*, 124 Mass. 311; *City Bank v. Ry.*, 44 N. Y. 136; *Emery v. Bank*, 25 O. S. 360; 18 Am. Rep. 299; *Richardson v. Nathan*, 167 Pa. St. 513; 31 Atl. 740; *Neil v. Produce Co.*, 41 W. Va. 37; 23 S. E. 702.

or discounted no title passes.²⁵ An agreement to pay a certain amount out of a certain fund may, as between the assignor and the assignee, amount to a partial assignment in equity, giving a lien on such fund.²⁶ Some statutes prescribe formalities for assigning certain kinds of contracts.²⁷ Where such statutes are exclusive, and make other forms of assignment invalid, effect must be given to such provisions. Thus assignments of wages to be valid against third persons must in Maine be filed where the assignor is "commorant."²⁸ If not so filed it is invalid as against a subsequent assignment duly filed.²⁹ Under a similar statute filing an assignment where the assignor resides is sufficient, though he removes to another town thereafter and it is not refiled.³⁰ Under other statutes an assignment must be in writing.³¹ A statute requiring a written assignment to pass the legal title does not require a writing to cancel an assignment.³² So if the statute provides that a purchaser's certificate at judicial sale may be assigned by indorsement thereon and legal title will thus pass, assignment on a separate paper will not pass legal title.³³ If statutes which provide for assignment are cumulative merely, an assignment is valid though not in conformity thereto. Thus a judgment may be assigned by parol, though the statute provides a form therefor.³⁴ Recording and filing of assignments are not necessary unless required by statute.³⁵ A statute requiring contracts for future wages to be recorded does not apply to building contracts.³⁶

²⁵ *Kentucky Refining Co. v. Refining Co.*, 104 Ky. 559; 84 Am. St. Rep. 468; 42 L. R. A. 353; 47 S. W. 602. (Hence the goods are liable to attachment by creditors of the consignor.)

²⁶ *Sanborn v. Maxwell*, 18 App. D. C. 245; *Leupold v. Weeks*, 96 Md. 280; 53 Atl. 937.

²⁷ *Turk v. Cook*, 63 Ga. 681.

²⁸ Under such statute a river driver is not "commorant." *Gilman v. Inman*, 85 Me. 105; 26 Atl. 1049.

²⁹ *Peabody v. Lewiston*, 83 Me. 286; 22 Atl. 171.

³⁰ *Garland v. Linsky*, 19 R. I. 713; 36 Atl. 837.

³¹ *Foster v. Sutlive*, 110 Ga. 297; 34 S. E. 1037.

³² *Rennie v. Block*, 26 Can. S. C. 356.

³³ *Chytraus v. Smith*, 141 Ill. 231; 30 N. E. 450.

³⁴ *Gardner v. R. R.*, 102 Ala. 635; 48 Am. St. Rep. 84; 15 So. 271.

³⁵ *McDonald v. Bank*, 111 Mich. 649; 70 N. W. 143.

³⁶ *Abbott v. Davidson*, 18 R. I. 91; 25 Atl. 839.

§1282. Necessity of consideration.

If an assignment is executed and passes legal title, then as between the assignor and the assignee no consideration is necessary. Such assignment is valid even though gratuitous.¹ If the assignment is executed and passes full title to the assignee, the debtor cannot object that the assignment was without consideration,² or that it was given for a pre-existing debt,³ or for due-bills of the assignee,⁴ or is otherwise invalid.⁵ As between two successive assignees of the same fund the prior must show that he took for value if he is to prevail against a subsequent *bona fide* assignee for value.⁶ If the assignment is executory, it is a contract to be enforced in equity by treating the equitable interest as passing thereunder. Such a contract, like any other, requires consideration.⁷

§1283. Necessity of acceptance by debtor.

It is not necessary that the debtor assent to the assignment to make it valid.¹ Hence an assignment is valid if notice is

¹ Bank-book in savings bank. Hallowell Savings Institution v. Titcomb, 96 Me. 62; 51 Atl. 249; Whalen v. Milbolland, 89 Md. 199; 44 L. R. A. 208; 43 Atl. 45; Dunn v. Houghton, (N. J. Eq.), 51 Atl. 71; Ridden v. Thrall, 125 N. Y. 572; 21 Am. St. Rep. 758; 11 L. R. A. 684; 26 N. E. 627; Polley v. Hicks, 58 O. S. 218; 41 L. R. A. 858; 50 N. E. 809. Certificate of deposit. Telford v. Patton, 144 Ill. 611; 33 N. E. 1119; Cowen v. Bank, 94 Tex. 551; 63 S. W. 532; 64 S. W. 778. Insurance policy. Hani v. Ins. Co., 197 Pa. St. 276; 47 Atl. 200; Lord v. Ins. Co., 95 Tex. 216; 66 S. W. 290.

² Jones v. Moore, 102 Ky. 591; 44 S. W. 126; Bonner v. Beard, 43 La. Ann. 1036; 10 So. 373; Phipps v. Bacon, 183 Mass. 5; 66 N. E. 414; Hicks v. Steel, 126 Mich. 408;

85 N. W. 1121; Coe v. Hinkley, 109 Mich. 608; 67 N. W. 915; Barnett v. Ellis, 34 Neb. 539; 52 N. W. 368.

³ Shaford v. Bank, 125 Mich. 431; 84 N. W. 624.

⁴ Glendale Fruit Co. v. Hirst, — Ariz. —; 59 Pac. 103.

⁵ Cornish, etc., Co. v. Marty, 76 Minn. 493; 79 N. W. 507.

⁶ The Elmbank, 72 Fed. 610.

⁷ Edwards v. Daley, 14 La. Ann. 384; Tallman v. Hoey, 89 N. Y. 537. "Assignment of choses in action have been said to be executory contracts, which are not to be enforced without consideration." Lonsdale's Estate, 29 Pa. St. 407, 410.

¹ Fourth Street National Bank v. Yardley, 165 U. S. 634; Schollmier v. Schoendelen, 78 Ia. 426; 16 Am. St. Rep. 455; 43 N. W. 282; Foss v. Bank, 111 Mass. 285; Tripp v.

given to the proper officer, though it is accepted by him without authority.² Accordingly a subsequent assignee with notice³ or subsequent attaching creditors⁴ take subject to the prior though unaccepted assignment. Under some statutes, however, a written acceptance is necessary.⁵ If the assignment is partial, assent of the debtor is necessary to its validity at law,⁶ but not in equity.⁷

§1284. Effect of acceptance.

Acceptance of the assignment by the debtor and his assent thereto constitute a new contract between himself and the assignee.¹ Under such new contract the rights of the assignee may be greater than those of the assignor under the original contract. Thus if an insurance company assents to an assignment, it waives a right of forfeiture which it had as against the assignor.² So if the drawee of an order accepts it uncondition-

Brownell, 12 Cush. (Mass.) 376; Oppenheimer v. Bank, 20 Mont. 192; 50 Pac. 419; Merchants', etc., Bank v. Barnes, 18 Mont. 335; 56 Am. St. Rep. 586; 47 L. R. A. 737; 45 Pac. 218; Slobodisky v. Curtis, 58 Neb. 211; 78 N. W. 522; Bank v. Bayonne, 48 N. J. Eq. 246; 21 Atl. 478; Coates v. First Nat. Bank, 91 N. Y. 20; Risley v. Phenix Bank, 83 N. Y. 318; 38 Am. Rep. 421; Gillette v. Murphy, 7 Okla. 91; 54 Pac. 413; Nesmith v. Drum, 8 Watts & S. (Pa.) 9; 42 Am. Dec. 260; Bank v. Rhea County (Tenn. Ch. App.), 59 S. W. 442.

² Seattle v. Liberman, 9 Wash. 276; 37 Pac. 433.

³ Sykes v. Bank, 2 S. D. 242; 49 N. W. 1058.

⁴ Union Iron Works v. Kilgore, 65 Minn. 497; 67 N. W. 1017; Burditt v. Porter, 63 Vt. 296; 25 Am. St. Rep. 763; 21 Atl. 955.

⁵ Berlin Mills Co. v. Poole, 62 N. H. 439. (Hence if the debtor pays future wages to an assignee he is

liable to a creditor of the assignor who attached the wages after the notice of the assignment was served but before the wages were paid.)

⁶ Kansas City, etc., Ry. v. Robertson, 109 Ala. 296; 19 So. 432; Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423; Gibson v. Cooke, 20 Pick. (Mass.) 15; 32 Am. Dec. 194; James v. Newton, 142 Mass. 366; 56 Am. Rep. 692; 8 N. E. 122; Bradley v. Berns, 51 N. J. Eq. 437; 26 Atl. 908.

⁷ Gillette v. Murphy, 7 Okla. 91; 54 Pac. 413.

¹ Chicago, etc., Ry. v. Ry., 143 U. S. 596; Hanover Ins. Co. v. Brown, 77 Md. 64; 39 Am. St. Rep. 386; 25 Atl. 989; 27 Atl. 314.

² Manchester Ins. Co. v. Glenn, 13 Ind. App. 365; 55 Am. St. Rep. 225; 40 N. E. 926; 41 N. E. 847; Medearis v. Ins. Co., 104 Ia. 88; 65 Am. St. Rep. 428; 73 N. W. 495; Hall v. Ins. Co., 93 Mich. 184; 32 Am. St. Rep. 497; 18 L. R. A. 135; 53 N. W. 727.

ally he may thereby become liable to the holder in excess of his liability to the drawer.³ If, however, the drawee accepts upon condition,⁴ as where he promises to pay out of a specified fund,⁵ or on the completion of certain work,⁶ he incurs no liability in excess of the terms of his acceptance.

**§1285. Covenants running with the land.—Freehold estates.—
Covenants conferring right upon grantee.**

Even at Common Law, although contract rights as a general rule could not be assigned, contracts which were intended by the parties to operate between them solely because of their respective estates in or relation to certain realty would pass from the owner of such estate to his grantee. If a covenant would pass to the assignee of the reversion, it was said to run with the reversion. A covenant was said to run with the land when it was binding upon any grantee to whom the original grantee might convey the land.¹ To be distinguished from these two classes of contracts are those which are intended to operate between the parties thereto without reference to their estates in realty, though such contract may be part of the transaction whereby such realty is conveyed by one party to the other. Such covenants are said to be personal covenants.² A right of action on a covenant running with the land cannot be assigned apart from the land.³ So if A conveys to B by warranty deed,

³ *Blakistone v. Bank*, 87 Md. 302; 39 Atl. 855; *Herter v. Goss, etc.*, Co., 57 N. J. L. 42; 30 Atl. 252.

⁴ *Herter v. Goss, etc., Co.*, 57 N. J. L. 42; 30 Atl. 252; *Greene v. Duncan*, 37 S. C. 239; 15 S. E. 956.

⁵ *Williams v. Gallyon*, 107 Ala. 439; 18 So. 162; *Moody v. Newmark*, 121 Cal. 446; 53 Pac. 944.

⁶ *Smith v. Trust Co.*, 12 App. D. C. 192; *Baker v. Dobbins*, 87 Ga. 545; 13 S. E. 524.

¹ *Lyman v. Ry.*, 190 Ill. 320; 52 L. R. A. 645; 60 N. E. 515; *Hickey*

v. Ry., 51 O. S. 40; 46 Am. St. Rep. 545; 23 L. R. A. 396; 36 N. E. 672.

² *Lisenby v. Newton*, 120 Cal. 571; 65 Am. St. Rep. 203; 52 Pac. 813; *Lincoln v. Burrage*, 177 Mass. 378; 52 L. R. A. 110; 59 N. E. 67; *Brown v. Southern Pacific Co.*, 36 Or. 128; 78 Am. St. Rep. 761; 47 L. R. A. 409; 58 Pac. 1104; *Clement v. Bank*, 61 Vt. 298; 4 L. R. A. 425; 17 Atl. 717.

³ *Ravenal v. Ingram*, 131 N. C. 549; 42 S. E. 967.

and B conveys to C without warranty, C may enforce A's warranty. B cannot retain the benefit of such covenant apart from the land, nor can he assign it without such realty.⁴ To run with the land the covenant must show in some form the intent that it shall inure to the benefit of ultimate grantees. However, if the habendum clause is to the grantee, his heirs and assigns, a covenant of warranty will run with the land even if the word "assigns" is not in the covenant.⁵ It is generally said that covenants must "touch and concern" the realty conveyed in order to run with the land. A contract not contained in a conveyance of some estate in realty cannot run with the land.⁶ Covenants of warranty,⁷ for quiet enjoyment,⁸ that grantor and those claiming under him would never claim any interest or estate in the land conveyed,⁹ a contract by an adjoining lot owner to pay the other one half the cost of constructing a party wall when he should make use of it,¹⁰ a contract to operate a street railroad,¹¹ or to build a side-track,¹² and a covenant to erect a depot in consideration of a grant of a right of way,¹³ run with the land up to the time that they are broken. A cove-

⁴ *Ravenal v. Ingram*, 131 N. C. 549; 42 S. E. 967.

⁵ *Wiggins v. Pender*, 132 N. C. 628; 61 L. R. A. 772; 44 S. E. 362.

⁶ *Hurxthal v. Boom Co.*, 53 W. Va. 87; 97 Am. St. Rep. 954; 44 S. E. 520.

⁷ *Peters v. Bowman*, 98 U. S. 56; *Wead v. Larkin*, 54 Ill. 489; 5 Am. Rep. 149; *Asher Lumber Co. v. Cornett* (Ky.), 63 S. W. 974; *Thomas v. Bland*, 91 Ky. 1; 14 S. W. 955; *Troxell v. Stevens*, 57 Neb. 329; 77 N. W. 781; *Walton v. Campbell*, 51 Neb. 788; 71 N. W. 737; *King v. Kerr*, 5 Ohio 154; 22 Am. Dec. 777; *Kenney v. Norton*, 10 Heisk. (Tenn.) 384; *Tillotson v. Prichard*, 60 Vt. 94; 6 Am. St. Rep. 95; 14 Atl. 302; *McConaughy v. Bennett*, 50 W. Va. 172; 40 S. E. 540.

⁸ *Butler v. Barnes*, 60 Conn. 170; 12 L. R. A. 273; 21 Atl. 419; *Fisher v. Parry*, 68 Ind. 465; *Schwallback v. Ry.*, 69 Wis. 292; 2 Am. St. Rep. 740; 34 N. W. 128.

⁹ *Trull v. Eastman*, 3 Met. (Mass.) 121; 37 Am. Dec. 126.

¹⁰ *Parsons v. Baltimore, etc., Association*, 44 W. Va. 335; 67 Am. St. Rep. 769; 29 S. E. 999; citing *Hart v. Lyon*, 90 N. Y. 663. But in *Lincoln v. Burrage*, 177 Mass. 378; 52 L. R. A. 110; 59 N. E. 67, a similar covenant was held not to run with the land in favor of the grantor personally.

¹¹ *Lakeview Land Co. v. Traction Co.*, 95 Tex. 252; 66 S. W. 766.

¹² *Missouri, etc., Ry. v. Carter*, 95 Tex. 461; 68 S. W. 159.

¹³ *Lyman v. Ry.*, 190 Ill. 320; 52 L. R. A. 645; 60 N. E. 515.

nant of right to convey,¹⁴ or a covenant of seizin,¹⁵ or a covenant against encumbrances,¹⁶ are each by the weight of authority broken when made, if at all, and therefore cannot run with the land. In England¹⁷ and in some American jurisdictions¹⁸ such covenants are held to be continuing covenants and to run with the land. This question is complicated with considerations of what constitutes a breach.

§1286. Covenants imposing burden upon grantee.

At Common Law covenants for the benefit of the realty could run with the land. Covenants imposing burdens thereon could not run with the land unless they created some recognized legal estate or interest.¹ In equity, however, a greater latitude has been indulged in by the courts in enforcing covenants which while not technically running with the land, are nevertheless intended to limit the use and enjoyment thereof. A covenant by a grantee to fence,² or by a grantor to fence,³ or a contract between adjoining lot owners to construct a party wall,⁴ and

¹⁴ *Le Roy v. Beard*, 8 How. (U. S.) 451; *Ladd v. Noyes*, 137 Mass. 151; *Real v. Hollister*, 20 Neb. 112; 29 N. W. 189; *Browne v. Walcott*, 1 N. D. 497; 48 N. W. 426.

¹⁵ *Bolinger v. Brake*, 57 Kan. 663; 47 Pac. 537.

¹⁶ *McPike v. Heaton*, 131 Cal. 109; 82 Am. St. Rep. 335; 63 Pac. 179; *Woodward v. Brown*, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2, 542; *Lawrence v. Montgomery*, 37 Cal. 183; *Mitchell v. Warner*, 5 Conn. 497; *Smith v. Richards*, 155 Mass. 79; 28 N. E. 1132; *Davenport v. Davenport*, 52 Mich. 587; 18 N. W. 371; *Chapman v. Kimball*, 7 Neb. 399; *Sears v. Broady*, — Neb. —; 92 N. W. 214; *Water's Estate v. Bagley* (Neb.), 92 N. W. 637; *Moore v. Merrill*, 17 N. H. 75; 43 Am. Dec. 593; *Kenney v. Norton*, 10 Heisk. (Tenn.) 380; *Swasey v. Brooks*, 30 Vt. 692; *Marbury v.*

Thornton, 82 Vt. 702; 1 S. E. 909.

¹⁷ *Kingdon v. Nottle*, 1 M. & S. 355; 4 M. & S. 53.

¹⁸ *Hazle v. Bondy*, 173 Ill. 302; 50 N. E. 671; *Scott v. Stetter*, 128 Ind. 385; 27 N. E. 721; *Boon v. McHenry*, 55 Ia. 202; 7 N. W. 503; *Security Bank v. Holmes*, 68 Minn. 538; 71 N. W. 699; s. c., 65 Minn. 531; 68 N. W. 113; *Geiszler v. De Graaf*, 166 N. Y. 339; 82 Am. St. Rep. 659; 59 N. E. 993; *Foot v. Burnet*, 10 Ohio 317; 36 Am. Dec. 90; *Lescalleet v. Rickner*, 16 Ohio C. C. 461.

¹ *Keppel v. Baily*, 2 Myl. & K. 517.

² *Hickey v. Ry.*, 51 O. S. 40; 46 Am. St. Rep. 545; 23 L. R. A. 396; 36 N. E. 672.

³ *Easter v. R. R.*, 14 O. S. 48.

⁴ *Adams v. Noble*, 120 Mich. 545; *sub nomine*, *Noble v. Kendall*, 79 N. W. 810.

covenants which restrict the use of the realty conveyed as to use it for certain purposes only⁵ are each enforceable against any grantee with notice, either actual or constructive, into whose hands the realty may come.

§1287. Effect of breach of covenant running with the land.

Even at Common Law the proper plaintiff in an action for the breach of a covenant running with the land is the holder of the title thereto at the time of breach, though he may not be the original grantee.¹ When a covenant running with the land is broken, the right of action for such breach does not run with the land;² restrictions on the use of the premises leased either against an assignee³ or a sub-lessee.⁴

§1288. Leasehold estates.—Covenants passing to assignee of lease.

Covenants which were intended to affect the property leased and which were contained in leases creating estates less than freehold were said at Common Law to run with the land and not with the reversion. This meant that the benefits and liabilities of such a covenant passed to the assignee of the lease, but not to the assignee or grantee of the reversion. Thus covenants for

⁵ *Rogers v. Hosegood* (1900), 2 Ch. 388; *Los Angeles University v. Swarth*, 107 Fed. 798; 54 L. R. A. 262; *Sutton v. Head*, 86 Ky. 156; 9 Am. St. Rep. 274; 5 S. W. 410; *Atlantic City v. Steel-Pier Co.*, 62 N. J. Eq. 139; 49 Atl. 822; *Clement v. Burtis*, 121 N. Y. 708; 24 N. E. 1013; *Stines v. Dorman*, 25 O. S. 580. *Contra*, under California statutes. *Los Angeles, etc., Co. v. Muir*, 136 Cal. 36; 68 Pac. 308.

¹ *Richard v. Bent*, 59 Ill. 38; 14 Am. Rep. 1; *Donnell v. Thompson*, 10 Me. 170; 25 Am. Dec. 216; *Chapman v. Kimball*, 7 Neb. 399.

² *Peters v. Bowman*, 98 U. S. 56;

Bradford v. Long, 4 Bibb. (Ky.) 225; *Smith v. Richards*, 155 Mass. 79; 28 N. E. 1132; *Wesco v. Kern*, 36 Or. 433; 59 Pac. 548; 60 Pac. 563; *Provident Trust Co. v. Fiss*, 147 Pa. St. 232; 23 Atl. 560; *Clement v. Bank*, 61 Vt. 298; 4 L. R. A. 425; 17 Atl. 717; *Wallace v. Perles*, 109 Wis. 316; 53 L. R. A. 644; 85 N. W. 371. *Contra*, by Georgia statute. *Tucker v. McArthur*, 103 Ga. 409; 30 S. E. 283.

³ *Wertheimer v. Hosmer*, 83 Mich. 56; 47 N. W. 47.

⁴ *Miller v. Prescott*, 163 Mass. 12; 47 Am. St. Rep. 434; 39 N. E.

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quiet enjoyment,¹ or an option to purchase,² or to renew,³ pass to the assignee of the lease and may be enforced by him. On the other hand, covenants to insure,⁴ to pay taxes,⁵ to repair,⁶ or to cultivate in a specified manner,⁷ or to build,⁸ or to pay rent,⁹ bind the assignee of the lease. The assignee is liable only for breaches while he holds the title to the property leased. He is not liable to the original lessor for a breach before the assignment, as for a covenant to put an oil well down in a specified time,¹⁰ or for breach of a covenant to pay rent made before the assignment.¹¹ If, however, he specifically assumes liability on the covenants of the original lease, he is liable to the lessor for breach before the assignment, at least in jurisdictions where one can sue on a contract for his benefit to which he is not a party.¹² Thus he may become liable for overdue rent¹³ or

¹ *Shelton v. Codman*, 3 Cush. (Mass.) 318; *Hamilton v. Wright*, 28 Mo. 199.

² *Blakeman v. Miller*, 136 Cal. 138; 89 Am. St. Rep. 120; 68 Pac. 587; *Page v. Hughes*, 2 B. Mon. (Ky.) 439; *Hagar v. Buck*, 44 Vt. 285; 8 Am. Rep. 368.

³ *McClintock v. Joyner*, 77 Miss. 678; 78 Am. St. Rep. 541; 27 So. 837.

⁴ *Masury v. Southworth*, 9 O. S. 340.

⁵ *Ellis v. Bradbury*, 75 Cal. 234; 17 Pac. 3; *Mason v. Smith*, 131 Mass. 510; *Craig v. Summers*, 47 Minn. 189; 15 L. R. A. 236; 49 N. W. 742; *West Virginia, etc., Ry. v. McIntire*, 44 W. Va. 210; 28 S. E. 696.

⁶ *Coburn v. Coodall*, 72 Cal. 498; 1 Am. St. Rep. 75; 14 Pac. 190. (Hence assignees of an undivided interest in the lease are jointly and severally liable on such covenants.)

⁷ *Gordon v. George*, 12 Ind. 408.

⁸ *Garnhart v. Finney*, 40 Mo. 449; 93 Am. Dec. 303.

⁹ *Benedict v. Everard*, 73 Conn.

157; 46 Atl. 870; *Sexton v. Storage Co.*, 129 Ill. 318; 16 Am. St. Rep. 274; 21 N. E. 920; *Trabue v. McAdams*, 8 Bush. (Ky.) 74; *Hogg v. Reynolds*, 61 Neb. 758; 87 Am. St. Rep. 522; 86 N. W. 479. (An assignee of an undivided one-half of the lease was here held liable for only one-half of the rent.) *Sutliff v. Atwood*, 15 O. S. 186; *Wittman v. Watry*, 45 Wis. 491. A sub-tenant is not liable to the original lessor for rent. *Dunlap v. Bullard*, 131 Mass. 161; *St. Joseph, etc., Ry. v. Ry.*, 135 Mo. 173; 33 L. R. A. 607; 36 S. W. 602; *Holman v. De Lin-River-Finley Co.*, 30 Or. 428; 47 Pac. 708.

¹⁰ *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576; 10 Am. St. Rep. 553; 16 Atl. 799.

¹¹ *Thomas v. Connell*, 5 Pa. St. 13.

¹² *Martineau v. Steele*, 14 Wis. 272.

¹³ *Woodland Oil Co. v. Crawford*, 55 O. S. 161; 34 L. R. A. 62; 44 N. E. 1093.

taxes.¹⁴ An assignee may discharge his liability on covenants running with the land by assigning the lease¹⁵ unless he has specifically assumed and agreed to pay the rent stipulated in the lease.¹⁶

§1289. Covenants passing to assignee of reversion.

A right of re-entry for breach of condition subsequent in a lease cannot be assigned before breach. While covenants to pay rent could pass with the reversion under the act 32 Hen. VIII. 34, the assignee of the reversion could not maintain an action against the tenant unless the tenant had done some act recognizing the grantee of the reversion as his landlord.¹ In England attornment was made unnecessary by statute.² This statute is in some states part of our Common Law.³ The Common-Law rule requiring attornment has been very generally abrogated by judicial decision as not in harmony with our theory of land-ownership. The assignee of the reversion can generally sue at law on covenants to pay rent without attornment.⁴ The Common-Law rule already referred to that covenants intended to bind the land could not pass with the reversion was changed in England by statute.⁵ In some of the United States this statute is part of the Common Law.⁶ In others this Common-Law rule has been changed by judicial decision as not in harmony with

¹⁴ *Fontaine v. Lumber Co.*, 109 Mo. 55; 32 Am. St. Rep. 648; 18 S. W. 1147.

¹⁵ *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481; *Bell v. Protective League*, 163 Mass. 558; 47 Am. St. Rep. 481; 28 L. R. A. 452; 40 N. E. 857; *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576; 10 Am. St. Rep. 553; 16 Atl. 799.

¹⁶ *Springer v. De Wolf*, 194 Ill. 218; 88 Am. St. Rep. 155; 56 L. R. A. 465; 62 N. E. 542.

¹ *Doe v. Smith*, 8 Ad. & El. 255. This was known as attornment. It was a relic of the feudal theory of the personal relation ex-

isting between landlord and tenant.

² 4 Anne. c. 16.

³ *Baldwin v. Walker*, 21 Conn. 168.

⁴ *Graham v. Le Sourd*, 99 Ill. App. 223; *Perrin v. Lepper*, 34 Mich. 292; *Jones v. Rigby*, 41 Minn. 530; 43 N. W. 390; *Smith v. Harrison*, 42 O. S. 180; *Pelton v. Place*, 71 Vt. 430; 46 Atl. 63; *Ohio Iron Co. v. Iron Co.*, 64 Minn. 404; 67 N. W. 221.

⁵ 32 Hen. VIII., c. 34.

⁶ *Fisher v. Deering*, 60 Ill. 114; *Howland v. Coffin*, 12 Pick. (Mass.) 125. *Contra*, *Crawford v. Chapman*, 17 Ohio 449.

the customs and habits of our people or with our general principles of law.⁷ In others the statute providing that the real party in interest may sue has been held to allow the assignee of the reversion to sue on covenants in the lease intended to protect the holder of the reversion.⁸ At modern law, therefore, covenants in a lease may be enforced by or against the assignee of the reversion. Thus the assignee of the reversion is liable on covenants of his assignor,⁹ as for quiet enjoyment,¹⁰ or on a covenant giving the tenant an option to purchase.¹¹ So the assignee of the reversion may enforce a covenant by the tenant to insure¹² or may enforce a forfeiture of a prior lease.¹³ The general rule, therefore, is that both rights and liabilities pass to the assignee of the reversion.

⁷ *Perrin v. Lepper*, 34 Mich. 292.

⁸ "In consequence of the rule of the Common Law, that a chose in action was not assignable, the assignee of a reversion could not maintain an action upon a covenant contained in a lease, against the lessee, though the covenant might run with the land. There was a distinction made between the assignee of the reversion and the assignee of the lease; and while the latter might maintain, and be liable to, an action upon such a covenant, it was different as to the former. To remedy this, the statute of 32 Hen. 8, cap. 34, was enacted, which gave, generally, to the assignee of the reversion the same right of action that the lessor had, upon the covenants in the lease. But this statute did not extend to mere personal and collateral covenants; it embraced those only which touched and concerned the thing demised. It has been decided by this court, that the statute of 32 Hen. 8, cap. 34, is not in force in this state, and that an assignee of the reversion cannot

maintain an action upon the covenants in the lease. But if the covenant be assignable in equity, so that an action might have been maintained in the name of the assignor, or relief obtained by a suit in equity, our code of civil procedure operates upon the remedy, even more extensively than the statute of 32 Hen. 8, cap. 34. For whether the covenant be collateral, or inhere in the land, if it be assigned, the assignee not only may, but, as the party beneficially interested, must sue in his own name." *Masury v. Southworth*, 9 O. S. 340, 346.

⁹ *Schoellkopf v. Coatsworth*, 166 N. Y. 77; 59 N. E. 710.

¹⁰ *Manchester, etc., Ry. v. Anderson* (1898), 2 Ch. 394.

¹¹ *Dietz v. Transfer Co.*, 95 Cal. 92; 30 Pac. 380.

¹² *Masury v. Southworth*, 9 O. S. 340.

¹³ *Aye v. Philadelphia Co.*, 193 Pa. St. 451; 74 Am. St. Rep. 696; 44 Atl. 555.

CHAPTER LIX.

NEGOTIABILITY.

§1290. Nature of negotiability.

Negotiable contracts were an exception to the Common-Law rule that contract rights could not be assigned.¹ If a negotiable contract were assigned in a proper manner, the holder could maintain an action at law thereon in his own name. It "may be transferred and assigned from the payee to any other man; contrary to the general rule of the Common Law that no chose in action is assignable; which assignment is the life of paper credit."² This right to sue in his own name implied that the party sued was prevented from making defenses which he would have been allowed to make against the party who had transferred the contract.³ At Common Law, therefore, there was no need to distinguish between assignable and negotiable contracts. All contracts which were assignable generally were also negotiable, and all negotiable contracts were also assignable. At Modern Law contracts are as a general rule assignable, so that the assignee may sue thereon in his own name.⁴ Some different test must therefore be found for negotiability, to distinguish it from mere assignability. This test is found in the fact that the transferee of a legal title of a negotiable contract takes it free from many defenses which might have been made against his transferee.⁵ The meaning of negotiability here given is that of negotiability in its fullest sense. A limited meaning of negotiability also exists. In many jurisdictions the statutes have made instruments, like bills of lading and warehouse receipts, "negotiable." The courts have generally held that such

¹ See § 1256.² II. Black Com. 468.³ What these defenses were willbe discussed hereafter. See § 1296 *et seq.*⁴ See § 1258.⁵ See § 1295.

a statute does not give such instrument negotiability in the full and complete sense of the word, but rather a quality differing from assignability only in the fact that the transfer of the instrument operates as a symbolical transfer of the property called for thereby,⁶ and that notice of the transfer of such instrument need not be given to the party issuing it.⁷ In this chapter negotiability will be discussed only in so far as concerns the liability of the promisor to the promisee and those claiming under him. There are many other results that flow from negotiability. Among these are the liability of the indorser to the indorsee, the necessity of demand, notice and protest, and the liability of sureties and guarantors. These subjects belong to a discussion of Negotiable Instruments, and will not be treated of in this work. The elements which a contract must possess to be negotiable, and the consequences which follow from the fact that the law requires such contracts to be in writing, have already been discussed.⁸

⁶ Commercial Bank v. Hurt, 99 Ala. 130; 42 Am. St. Rep. 38; 19 L. R. A. 701; 12 So. 568; Cavallo v. R. R., 110 Cal. 348; 52 Am. St. Rep. 94; 42 Pac. 918; Zellner v. Mobley, 84 Ga. 746; 20 Am. St. Rep. 390; 11 S. E. 402; Douglas v. Bank, 86 Ky. 176; 9 Am. St. Rep. 276; 5 S. W. 420; National Bank v. R. R., 44 Minn. 224; 20 Am. St. Rep. 566; 9 L. R. A. 263; 46 N. W. 342, 560; Anderson v. Mills, 37 Or. 483; 82 Am. St. Rep. 771; 50 L. R. A. 235; 60 Pac. 839; Geilfuss v. Corrigan, 95 Wis. 651; 60 Am. St. Rep. 143; 37 L. R. A. 167; 70 N. W. 306. "What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange, and, afterwards, promissory notes. At Common Law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promis-

sory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term 'negotiable' expresses, at least primarily, this mode and effect of a transfer. In regard to bills and notes, certain other consequences generally, though not always, follow. . . . (Discussing the rights of a *bona fide* holder.) But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them." Shaw v. R. R., 101 U. S. 557, 562.

⁷ See § 1292.

⁸ See Ch. XXXVI.

§1291. What contracts are negotiable.— Bills and notes.

Applying the principles already given, bills of exchange have always been held to be negotiable;¹ and cashiers' checks, being a form of bill, are also negotiable.² Whether promissory notes were negotiable at Common Law is a difficult question. The English merchants undoubtedly treated them as negotiable, but Lord Holt held that they were not, and denounced the theory that they were negotiable as due to the "obstinacy and opinionativeness of merchants who were endeavoring to set the law of Lombard street above the law of Westminster Hall."³ Parliament settled the question by statute⁴ in favor of their negotiability. Was this statute declaratory or remedial? We have authorities either way, some holding that Lord Holt was wrong, that promissory notes were negotiable at Common Law and that the statute of Anne was declaratory,⁵ while others agree with Lord Holt.⁶ The question is of practical importance in jurisdictions in the United States in which the statute of Anne is not in force and no similar statute has been adopted. Between statutes and judicial decisions it is now thoroughly settled in the United States that promissory notes are negotiable.⁷ So

¹ *Jarvis v. Wilson*, 46 Conn. 90; 33 Am. Rep. 18; *Chenoweth v. Chamberlain*, 6 B. Mon. (Ky.) 60; 43 Am. Dec. 145; *Carter v. Bank*, 7 Humph. (Tenn.) 548; 46 Am. Dec. 89.

² *Henry v. Allen*, 151 N. Y. 1; 36 L. R. A. 658; 45 N. E. 355; *Drinkall v. Bank*, 11 N. D. 10; 95 Am. St. Rep. 693; 57 L. R. A. 341; 88 N. W. 724. Such a check differs from an ordinary bank check in that it cannot be countermanded at will. *Drinkall v. Bank*, 11 N. D. 10; 95 Am. St. Rep. 693; 57 L. R. A. 341; 88 N. W. 724.

³ *Clerke v. Martin*, 2 Ld. Raym. 557; 1 Salk. 129, 363.

⁴ 3 and 4 Anne, c. 9.

⁵ *Goodwin v. Roberts*, L. R. 10 Exch. 337; *Dunn v. Adams*, 1 Ala.

527; 35 Am. Dec. 42; *Irvin v. Mau-ry*, 1 Mo. 194.

⁶ *First National Bank v. Hunt*, 25 Mo. App. 172; *Davis v. Miller*, 14 Gratt. (Va.) 1. "Promissory notes are *quasi* mercantile, but are not in this country, as they are in England, since the statute of Anne negotiable precisely as bills of exchange." *Taylor v. Craig*, 2 J. J. Mar. (Ky.), 449, 460; quoted in *Smith v. Moberly*, 10 B. Mon. (Ky.) 266; 52 Am. Dec. 543.

⁷ *Murphy v. Improvement Co.*, 97 Fed. 723; *Louisville Banking Co. v. Gray*, 123 Ala. 251; 82 Am. St. Rep. 120; 26 So. 205; *Siegel v. Bank*, 131 Ill. 569; 19 Am. St. Rep. 51; 7 L. R. A. 537; 23 N. E. 417; *Clanin v. Machine Co.*, 118 Ind. 372; 3 L. R. A. 863; 21 N. E. 35;

checks,⁸ certificates of deposit,⁹ coupon bonds¹⁰ and coupons on bonds¹¹ are negotiable. Warrants drawn by public officials are negotiable if payable absolutely and consisting of an order or a promise.¹² If payable conditionally, as where drawn on some particular fund,¹³ or if given simply as a voucher of the amount due,¹⁴ though *prima facie* valid,¹⁵ they are not negotiable.¹⁶ They cannot be re-issued after they have been paid

Hatch v. Bank, 94 Me. 348; 80 Am. St. Rep. 401; 47 Atl. 908; Choate v. Stevens, 116 Mich. 28; 43 L. R. A. 277; 74 N. W. 289; Famous Shoe Co. v. Crosswhite, 124 Mo. 34; 46 Am. St. Rep. 424; 26 L. R. A. 568; 27 S. W. 397; Kirkwood v. Bank, 40 Neb. 484; 42 Am. St. Rep. 683; 24 L. R. A. 444; 58 N. W. 1016; Chase National Bank v. Faurot, 149 N. Y. 532; 35 L. R. A. 605; 44 N. E. 164; Hollinshead v. Stuart, 8 N. D. 35; 42 L. R. A. 659; 77 N. W. 89; Albertson v. Laughlin, 173 Pa. St. 525; 51 Am. St. Rep. 777; 34 Atl. 216; American National Bank v. Paper Co., 19 R. I. 149; 61 Am. St. Rep. 746; 29 L. R. A. 103; 32 Atl. 305; McLaughlin v. Braddy, 63 S. C. 433; 90 Am. St. Rep. 681; 41 S. E. 523; Merrill v. Hurley, 6 S. D. 592; 55 Am. St. Rep. 859; 62 N. W. 958; Ferriss v. Tavel, 87 Tenn. 386; 3 L. R. A. 414; 11 S. W. 93.

⁸ Leach v. Hill, 106 Ia. 171; 76 N. W. 667; Humphries v. Bicknell, 2 Litt. (Ky.) 296; 13 Am. Dec. 268; Shepard, etc., Co. v. Eldridge, 171 Mass. 516; 68 Am. St. Rep. 446; 41 L. R. A. 617; 51 N. E. 9; Barnet v. Smith, 30 N. H. 256; 64 Am. Dec. 290.

⁹ Bank v. Trust Co., 105 Fed. 491; Citizens' National Bank v. Brown, 45 O. S. 39; 4 Am. St. Rep. 526; 11 N. E. 799.

¹⁰ Waite v. Santa Cruz, 184 U. S. 302; Fairfield v. School District,

116 Fed. 838; reversing 111 Fed. 453; Central, etc., Co. v. Trust Co., 114 Fed. 263.

¹¹ Trustees v. Lewis, 34 Fla. 424; 43 Am. St. Rep. 209; 26 L. R. A. 743; 16 So. 325.

¹² Negotiable when drawn on any money in the treasury not otherwise appropriated. Blaisdell v. School District, 72 Vt. 63; 47 Atl. 173. Negotiable as far as concerns title. Fidelity Trust Co. v. Palmer, 22 Wash. 473; 79 Am. St. Rep. 953; 61 Pac. 158.

¹³ National Bank v. Herold, 74 Cal. 603; 5 Am. St. Rep. 476; 16 Pac. 507.

¹⁴ City warrants. City of Hammond v. Evans, 23 Ind. App. 501; 55 N. E. 784. County warrants. Atchison, etc., R. R. v. Kearny Co., 58 Kan. 19; 48 Pac. 583; First National Bank v. Gates, 66 Kan. 505; 97 Am. St. Rep. 383; *sub nomine*, Vawter v. Gates, 72 Pac. 207. Township warrants. Gilman v. Gilby Township, 8 N. D. 627; 73 Am. St. Rep. 791; 80 N. W. 889.

¹⁵ Pacific Paving Co. v. Mowbray, 127 Cal. 1; 59 Pac. 205.

¹⁶ Shakspear v. Smith, 77 Cal. 638; 11 Am. St. Rep. 327; 20 Pac. 294; Goose River National Bank v. School Township, 1 N. D. 26; 26 Am. St. Rep. 605; 44 N. W. 1002; Township of Snyder v. Boviard, 122 Pa. St. 442; 9 Am. St. Rep. 118; 15 Atl. 910; Hubbell v. Custer City, 15 S. D. 55; 87 N. W. 520.

and retired.¹⁷ Deposits in a savings-bank are usually made under contract that they are payable only on production of the pass-book in which such deposit is entered. This differs from similar provisions with reference to the return of certificates of deposit, in that the entries in the pass-book are mere receipts or memoranda of the money deposited. Accordingly such pass-books are not negotiable.¹⁸ There is a conflict of authority as to whether a mortgage given to secure a negotiable note is itself negotiable, some jurisdictions holding that before the maturity of the note, the assignment of the note in such form as to preserve its negotiability, carries with it the mortgage as a negotiable instrument, as free from defenses as the note;¹⁹ others that such assignment of the note carries the mortgage with it, but as a non-negotiable instrument, subject to all defenses.²⁰

¹⁷ *Pugh v. More*, 44 La. Ann. 209; 10 So. 710; *Richardson v. Marshall County*, 100 Tenn. 346; 45 S. W. 440; *Branch v. Commissioners*, 80 Va. 427; 56 Am. Rep. 596; *Bardsley v. Sternberg*, 17 Wash. 243; 49 Pac. 499; reversed in part on rehearing, 18 Wash. 612; 52 Pac. 251, 524; distinguishing *Blake v. Johnson County*, 18 Kan. 266; *Morrow v. Surber*, 97 Mo. 155; 11 S. W. 48.

¹⁸ *McCaskill v. Bank*, 60 Conn. 300; 25 Am. St. Rep. 323; 13 L. R. A. 737; 22 Atl. 568; *White v. Cushing*, 88 Me. 339; 51 Am. St. Rep. 402; 32 L. R. A. 590; 34 Atl. 164; *Pierce v. Bank*, 129 Mass. 425; 37 Am. Rep. 371; *Kummel v. Bank*, 127 N. Y. 488; 13 L. R. A. 786; 28 N. E. 398; *Iron City National Bank v. McCord*, 139 Pa. St. 52; 23 Am. St. Rep. 166; 11 L. R. A. 559; 21 Atl. 143.

¹⁹ *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *O'Rourke v. Wahl*, 109 Fed. 276; 48 C. C. A. 360; *Gabbert v. Schwartz*, 69 Ind. 450; *Preston v. Case*, 42 Ia. 549; *Cox v. Cayan*, 117

Mich. 599; 72 Am. St. Rep. 585; 76 N. W. 96; *Wilson v. Campbell*, 110 Mich. 580; 35 L. R. A. 544; 68 N. W. 278; *Borgess Investment Co. v. Vette*, 142 Mo. 560; 64 Am. St. Rep. 567; 44 S. W. 754; *First National Bank v. Flath*, 10 N. D. 281; 86 N. W. 867; *Christianson v. Warehouse Association*, 5 N. D. 438; 32 L. R. A. 730; 67 N. W. 300; *Nashville Trust Co. v. Smythe*, 94 Tenn. 513; 45 Am. St. Rep. 748; 27 L. R. A. 663; 29 S. W. 903; *Mack v. Prang*, 104 Wis. 1; 76 Am. St. Rep. 848; 45 L. R. A. 407; 79 N. W. 770.

²⁰ *Foster v. McGuire*, 96 Ga. 447; 23 S. E. 398; *Chicago, etc., Co. v. Aff*, 183 Ill. 91; 55 N. E. 659; *Mullanphy Savings Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401; 26 N. E. 640; *Pertuit v. Damare*, 50 La. Ann. 893; 24 So. 681; *Paulsen v. Koon*, 85 Minn. 240; 88 N. W. 760; *Tate v. Trust Co.*, 63 N. J. Eq. 559; 52 Atl. 313. (But here the assignee took as security for pre-existing debts and was held not to take for value.) *Bailey v. Smith*,

§1292. Symbols of property.

Bills of lading¹ and warehouse receipts,² call for property other than money. They are accordingly not negotiable in the full sense of the word. Bills of lading are symbols of the property therein described and their transfer operates as a transfer of transferrer's interest in such property.³ Thus one who discounts a draft to which a bill of lading is attached as security, holds the property described in such bill as collateral security. The carrier is liable to the holder of the bill of lading if he delivers the goods without the bill.⁴ The transfer of a bill of lading defeats the consignor's right of stoppage *in transitu*.⁵ The transferee of a bill of lading has a priority over an attaching creditor.⁶ To that extent they have a qualified or *quasi* negotiability. There is a wide difference, however, between such qualified negotiability and full negotiability. The transferee of such a bill of lading acquires no better interest than that of his transferrer. The carrier may show as against a *bona fide* holder that he did not receive the goods mentioned in the bill of lading.⁷ Even if by statute a carrier is liable

14 O. S. 396; 84 Am. Dec. 385; Bank v. Roessler, 186 Pa. St. 431; 40 Atl. 963.

¹ National Bank v. R. R., 44 Minn. 224; 20 Am. St. Rep. 566; 9 L. R. A. 263; 46 N. W. 342, 560.

² Anderson v. Flouring Mills, 37 Or. 483; 82 Am. St. Rep. 771; 50 L. R. A. 238; 60 Pac. 839.

³ Douglas v. Bank, 86 Ky. 176; 9 Am. St. Rep. 276; 5 S. W. 420; Midland National Bank v. R. R., 132 Mo. 492; 53 Am. St. Rep. 505; 33 S. W. 521; Emery v. Bank, 25 O. S. 360; 18 Am. Rep. 299; Neill v. Produce Co., 41 W. Va. 37; 23 S. E. 702.

⁴ Union Pacific R. R. v. Johnson, 45 Neb. 57; 50 Am. St. Rep. 540; 63 N. W. 144; First National Bank v. Ry., 28 Wash. 439; 68 Pac. 965.

⁵ Even of a duplicate bill of lading. Missouri Pacific R. R. v. Hei-

denheimer, 82 Tex. 195; 27 Am. St. Rep. 861; 17 S. W. 608.

⁶ American National Bank v. Henderson, 123 Ala. 612; 82 Am. St. Rep. 147; 26 So. 498; Shaffer v. Rhynders, 116 Ia. 472; 89 N. W. 1099; Ayers, etc., Co. v. Dorsey, 101 Ia. 141; 63 Am. St. Rep. 376; 70 N. W. 111; Scharff v. Meyer, 133 Mo. 428; 54 Am. St. Rep. 672; 34 S. W. 858.

⁷ Brown v. Coal Co., L. R. 10 C. P. 562; Friedlander v. Ry., 130 U. S. 416; National Bank v. R. R., 44 Minn. 224; 20 Am. St. Rep. 566; 9 L. R. A. 263; 46 N. W. 342, 560. *Contra*, on the theory of estoppel. Wichita Savings Bank v. Ry., 20 Kan. 519; Sioux City, etc., Ry. v. Bank, 10 Neb. 556; 35 Am. Rep. 488; 7 N. W. 311; Batavia Bank v. R. R., 106 N. Y. 195; 60 Am. Rep. 440; 12 N. E. 433.

for damages resulting to any person from issuing a bill of lading without receiving the goods, it may be shown that the bill was issued by an authorized agent to a fictitious payee, and endorsed by the agent with the payee's name.⁸ If a bill of lading is stolen a subsequent *bona fide* transferee acquires no title thereunder. Thus where the original bill was attached to a draft and sent to A for collection, and when A presented it to B for acceptance, B accepted the draft, secretly detached the original bill, substituted the duplicate received by him from the consignor, left the duplicate and accepted draft with A, and sold the original bill to X, X had no title as against A.⁹ Delivery to one having possession of a bill of lading not indorsed to him except by forged indorsement does not relieve the carrier.¹⁰ So if a bill of lading is obtained from the owner by fraud, a subsequent *bona fide* holder has no title as against the real owner.¹¹ So where a bill of lading of goods consigned to the vendor was not endorsed, a duplicate bill having been sent to the vendee for his convenience only, and the consignor holding the original, the carrier is not protected by delivery to the vendee.¹² Delivery to the consignee protects the carrier though the consignor took the bill of lading in his own name and retained it.¹³ The rules generally applicable to assignment of contracts and transfers of property apply to bills of lading. Accordingly if the owner invests another with all the external appearance of ownership, he is not allowed to defeat rights acquired in reliance on such external appearance. This is referable, however, to principles of estoppel and has nothing to do with negotiability. Warehouseman is liable on receipts issued by an authorized agent, in the hands of a *bona fide* holder, though the goods were never delivered.¹⁴ A warehouseman

⁸ Jasper Trust Co. v. R. R., 99 Ala. 416; 42 Am. St. Rep. 75; 14 So. 546.

⁹ Shaw v. R. R., 101 U. S. 557. (Even under a statute making bills of lading negotiable. See § 1290.)

¹⁰ Cavallaro v. R. R., 110 Cal. 348; 52 Am. St. Rep. 94; 42 Pac. 918.

¹¹ Decan v. Shipper. 35 Pa. St. 239; 78 Am. Dec. 334.

¹² Weyand v. Ry., 75 Ia. 573; 9 Am. St. Rep. 504; 1 L. R. A. 650; 39 N. W. 899.

¹³ Nebraska Meals Mills v. R. R., 64 Ark. 169; 62 Am. St. Rep. 183; 41 S. W. 810.

¹⁴ Hanover National Bank v.

may redeliver the identical goods received and called for by receipt, even if of no actual value, and thus end his liability.¹⁵ A storage receipt for pig-iron issued by a furnace company not engaged in the warehouse business was held not negotiable and delivery of the receipt did not amount to a pledge.¹⁶ Even under a statute making a warehouse receipt negotiable, the owner of property whose agent has deposited it in a warehouse, taking a receipt therefor in his own name, may recover the property as against the *bona fide* assignee of such agent.¹⁷ The owner of an unindorsed warehouse receipt may recover the goods from the warehouseman, though the receipt provides for the delivery of the goods on the return of the receipt properly indorsed.¹⁸ A certificate of stock possesses a qualified negotiability, in that its transfer passes the title to the stock, free from latent equities between prior vendor and vendee.¹⁹ Thus if A assigns a stock certificate in blank and delivers it to B as his agent to enable B to raise money for A, a *bona fide* assignee from B has priority over A.²⁰ So the rights of a *bona fide* purchase of a certificate purporting to be paid up prevail over the rights of creditors of the corporation.²¹ So a corporation is liable on stock certificates fraudulently issued by an authorized officer, if in the hands of *bona fide* holders.²² It is not negotiable in the fullest meaning of the word.²³ If the certificate has been lost after being

Trust, 148 N. Y. 612; 51 Am. St. Rep. 721; 43 N. E. 72.

¹⁵ Dean v. Driggs, 137 N. Y. 274; 33 Am. St. Rep. 721; 19 L. R. A. 302; 33 N. E. 326.

¹⁶ Geilfuss v. Corrigan, 95 Wis. 651; 60 Am. St. Rep. 143; 37 L. R. A. 167; 70 N. W. 306.

¹⁷ Commercial Bank v. Hurt, 99 Ala. 130; 42 Am. St. Rep. 38; 19 L. R. A. 701; 12 So. 568.

¹⁸ Shingleur-Johnson Co. v. Warehouse Co., 78 Miss. 875; 84 Am. St. Rep. 655; 29 So. 770.

¹⁹ Supply Ditch Co. v. Elliot, 10 Colo. 327; 3 Am. St. Rep. 586; 15 Pac. 691; Campbell v. Zylonite Co., 122 N. Y. 455; 11 L. R. A. 596; 25

N. E. 853; First National Bank v. Holland, 99 Va. 495; 55 L. R. A. 155; 39 S. E. 126.

²⁰ Brittan v. Bank, 124 Cal. 282; 71 Am. St. Rep. 58; 57 Pac. 84.

²¹ Wallace v. Mfg. Co., 70 Minn. 321; 68 Am. St. Rep. 530; 73 N. W. 189.

²² Cincinnati, etc., R. R. v. Bank, 56 O. S. 351; 43 L. R. A. 777; 47 N. E. 249.

²³ Moores v. Bank, 111 U. S. 156; Bangor, etc., Co. v. Robinson, 52 Fed. 520; Swim v. Wilson, 90 Cal. 126; 25 Am. St. Rep. 110; 13 L. R. A. 605; 27 Pac. 33; Barstow v. Mining Co., 64 Cal. 388; 49 Am. Rep. 705; 1 Pac. 349; O'Herron v. Gray,

indorsed in blank, without the fault of the owner;²⁴ or if it is surrendered to the corporation for cancellation, and is fraudulently re-issued by an officer without cancellation;²⁵ or is surrendered to the company to secure a debt of A, the owner, is thought to be lost so that a new certificate is issued and sold to B, and A, who is an officer of the company, subsequently finds the lost certificate and pledges it for value to X;²⁶ or is assigned by the guardian of the minor owner²⁷ the real owner may assert his right thereto against the holder of the stock certificate. So is the holder of a certificate not purporting on its face to be paid up, takes subject to the rights of the corporation, the corporation must issue a new certificate to the assignee.²⁸

§1293. Effect of negotiability on rights of parties.—When in hands of original party.

Between the immediate parties to a negotiable contract the fact of negotiability is for most purposes immaterial. Any defense may be set up against the adversary party that could have been made in a non-negotiable contract, such as mistake,¹ fraud,² duress,³ want of consideration,⁴ illegality, as where the

168 Mass. 573; 60 Am. St. Rep. 411; 40 L. R. A. 498; 47 N. E. 429; Farrington v. R. R., 150 Mass. 406; 15 Am. St. Rep. 222; 23 N. E. 109; Anderson v. Nicholas, 28 N. Y. 600; Farmers' Bank v. Lock Co., 66 O. S. 367; 90 Am. St. Rep. 586; 58 L. R. A. 620; 64 N. E. 518; Biddle v. Bayard, 13 Pa. St. 150. It has been said that while the usages of business "have given them some of the elements of negotiability," the courts "have with great uniformity held that stock certificates were not negotiable instruments within the broad meaning of that phrase." Knox v. American Co., 148 N. Y. 441; 51 Am. St. Rep. 700; 31 L. R. A. 779; 42 N. E. 988.

²⁴ East Birmingham Land Co. v.

Dennis, 85 Ala. 565; 7 Am. St. Rep. 73; 2 L. R. A. 836; 5 So. 317.

²⁵ Knox v. American Co., 148 N. Y. 441; 51 Am. St. Rep. 700; 31 L. R. A. 779; 42 N. E. 988.

²⁶ Farmers' Bank v. Lock Co., 66 O. S. 367; 90 Am. St. Rep. 586; 58 L. R. A. 620; 64 N. E. 518.

²⁷ O'Herron v. Gray, 168 Mass. 573; 60 Am. St. Rep. 411; 40 L. R. A. 498; 47 N. E. 429.

²⁸ Craig v. Water Co., 113 Cal. 7; 54 Am. St. Rep. 316; 35 L. R. A. 306; 45 Pac. 10.

¹ Beland v. Brewing Association, 157 Mo. 593; 58 S. W. 1.

² Fay v. Fay, 121 Mass. 561.

³ Peckham v. Van Bergen, 10 N. D. 43; 84 N. W. 566.

⁴ Lang v. Dietz, 191 Ill. 161; 60

instrument is given to defraud creditors,⁵ or for illegal sales of intoxicating liquor,⁶ or for services of an unlicensed broker,⁷ to stifle criminal prosecution,⁸ or to aid rebellion;⁹ or failure of consideration.¹⁰ While the technical *bona fide* holder is one who takes from one of the original parties to the contract, mediately or immediately, the original payee who advances money in ignorance of defenses may be given the same protection as a *bona fide* holder,¹¹ as where he does not know that the signature of a surety is conditioned on obtaining the signature of another who did not in fact sign.¹²

§1294. When in hands of transferee not a bona fide holder.

If a negotiable instrument has been transferred to one who is not a *bona fide* holder for value, his rights are those and only those, of the person who transferred the instrument to him. Any defense which could have been made against the transferor, can be made against the transferee.¹ Thus the maker

N. E. 841; Shaw v. Camp, 160 Ill. 425; 43 N. E. 608; Grove v. Jeager, 60 Ill. 249; Parish v. Stone, 14 Pick. (Mass.) 198; 25 Am. Dec. 378; McBryan v. Elevator Co., 130 Mich. 111; 89 N. W. 683; Graham v. Alexander, 123 Mich. 168; 81 N. W. 1084; Voorhees v. Combs, 33 N. J. L. 494; Andrews v. Schmidt, 10 N. D. 1; 84 N. W. 568; Starr v. Starr, 9 O. S. 74; Hamor v. Moore, 8 O. S. 239.

⁵McTighe v. McKee, 70 Ark. 293; 67 S. W. 754.

⁶Adams v. Hackett, 27 N. H. 289; 59 Am. Dec. 376.

⁷Douthart v. Congdon, 197 Ill. 349; 64 N. E. 348.

⁸Friend v. Miller, 52 Kan. 139; 39 Am. St. Rep. 340; 34 Pac. 397; Haynes v. Rudd, 102 N. Y. 372; 55 Am. Rep. 815; 7 N. E. 287.

⁹Hanauer v. Doane, 12 Wall. (U. S.) 342; Ruddell v. Landers, 25 Ark. 238; 94 Am. Dec. 717.

¹⁰Means v. Subers, 115 Ga. 371; 41 S. E. 633; Cooper v. King, 73 Ia. 136; 34 N. W. 781; Dickinson v. Hall, 14 Pick. (Mass.) 217; 25 Am. Dec. 390.

¹¹Provident, etc., Co. v. Mercer County, 170 U. S. 593; O'Keeffe v. Bank, 49 Kan. 347; 33 Am. St. Rep. 370; 30 Pac. 473.

¹²Lookout Bank v. Aull, 93 Tenn. 645; 42 Am. St. Rep. 934; 27 S. W. 1014.

¹Hays v. Plummer, 126 Cal. 107; 77 Am. St. Rep. 153; 58 Pac. 447; Mullanphy Savings Bank v. Schott, 135 Ill. 655; 25 Am. St. Rep. 401; 26 N. E. 640; Pavay v. Stauffer, 45 La. Ann. 353; 19 L. R. A. 716; 12 So. 512; Smith v. Bibber, 82 Me. 34; 17 Am. St. Rep. 464; 19 Atl. 89; First National Bank v. Strauss, 66 Miss. 479; 14 Am. St. Rep. 579; 6 So. 232; Sackett v. Montgomery. 57 Neb. 424; 73 Am. St. Rep. 522; 77 N. W. 1083.

may, as against an assignee who is not a *bona fide* holder interpose the defense of want of power of the agent issuing the instrument,² or of the partner issuing it,³ that the contract was under the circumstances *ultra vires*,⁴ that the instrument was induced by fraud,⁵ or duress,⁶ that the maker has the right of set-off,⁷ breach of condition releasing a party thereto as that the maker had contracted for a specified application of the proceeds of the note,⁸ illegality,⁹ that the instrument was not without consideration,¹⁰ or that the consideration for which the instrument was given has failed.¹¹ As between the promisor and an assignee who is not a *bona fide* holder for value, it follows that the question of negotiability is immaterial.

§1295. When in hands of bona fide holder.

The chief peculiarity of a negotiable contract, therefore, is its effect in the hands of a *bona fide* holder, who may enforce

² Lamson v. Beard, 94 Fed. 30; 45 L. R. A. 822; Helena National Bank v. Telegraph Co., 20 Mont. 379; 64 Am. St. Rep. 628; 51 Pac. 829; Gerard v. McCormick, 130 N. Y. 261; 14 L. R. A. 234; 29 N. E. 115; Greenville v. Ormand, 51 S. C. 58; 64 Am. St. Rep. 663; 39 L. R. A. 847; 28 S. E. 50; Gregg v. Groesbeck, 11 Utah 310; 32 L. R. A. 266; 40 Pac. 202.

³ Brown v. Pettit, 178 Pa. St. 17; 56 Am. St. Rep. 742; 34 L. R. A. 723; 35 Atl. 865.

⁴ National Park Bank v. Warehouse Co., 116 N. Y. 281; 5 L. R. A. 673; 22 N. E. 567.

⁵ Lockwood v. Tate, 96 Ala. 353; 11 So. 406; Griffith v. Shipley, 74 Md. 591; 14 L. R. A. 405; 22 Atl. 1107; National Citizens' Bank v. Ertz, 83 Minn. 12; 85 Am. St. Rep. 438; 53 L. R. A. 174; 85 N. W. 821; Canajoharie National Bank v. Diefendorf, 123 N. Y. 191; 10 L. R. A. 676; 25 N. E. 402; Goshen National Bank v. Bingham, 118 N. Y.

349; 16 Am. St. Rep. 765; 7 L. R. A. 595; 23 N. E. 180; Hickson v. Early, 62 S. C. 42; 39 S. E. 782.

⁶ Shirk v. Neible, 156 Ind. 66; 83 Am. St. Rep. 150; 59 N. E. 281; Galusha v. Sherman, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495.

⁷ Colton v. Loan Association, 90 Md. 85; 78 Am. St. Rep. 431; 46 L. R. A. 388; 45 Atl. 23.

⁸ Greever v. Bank, 99 Va. 547; 39 S. E. 159.

⁹ Maine Mile-Track Association v. Hammond, 127 Mich. 690; 87 N. W. 135.

¹⁰ Morris v. Banking Co., 109 Ga. 12; 46 L. R. A. 506; 34 S. E. 378; Henneberry v. Morse, 56 Ill. 394; Peterson v. Johnson, 22 Wis. 21; 94 Am. Dec. 581.

¹¹ Hays v. Plummer, 126 Cal. 107; 77 Am. St. Rep. 153; 58 Pac. 447; Russ Lumber Co. v. Water Co., 120 Cal. 521; 65 Am. St. Rep. 186; 52 Pac. 995; Battery Park Bank v. Loughran, 126 N. C. 814; 36 S. E. 281.

the negotiable instrument free from all defenses which could have been made against the original payee, except those hereinafter discussed.¹ Thus fraud in the inducement,² duress,³ *ultra vires*, where the contract might under some facts be within the power of the corporation, but under the facts of the particular case is not,⁴ want of authority in the agent indorsing the instrument if under the circumstances apparent he might have had power to indorse,⁵ the date of execution,⁶ that the instrument though delivered was not to go into effect until signed by additional securities,⁷ want of consideration,⁸ indorse-

¹ See §§ 1296-1299. *Jenkins v. Jones*, 108 Ga. 556; 34 S. E. 149; *Gregory v. Pike*, 94 Me. 27; 46 Atl. 793; *Mechanics' Bank v. Chardavoyne*, 69 N. J. L. 256; 55 Atl. 1080; *Morrison v. Bank*, 9 Okla. 697; 60 Pac. 273; *Hurlburt v. Straub*, — W. Va. —; 46 S. E. 163.

² *Swift v. Tyson*, 16 Pet. (U. S.) 1; *Chilton v. Gratton*, 82 Fed. 873; *Rowland v. Fowler*, 47 Conn. 347; *Walters v. Palmer*, 110 Ga. 776; 36 S. E. 79; *Taft v. Myerscough*, 92 Ill. App. 560; *Brickley v. Edwards*, 131 Ind. 3; 30 N. E. 708; *Shenandoah National Bank v. Marsh*, 89 Ia. 273; 48 Am. St. Rep. 381; 56 N. W. 458; *Potter v. Belden*, 105 Mass. 11; *First National Bank v. Houseknecht*, 121 Mich. 313; 80 N. W. 13; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375; 10 S. W. 45; s. e., 85 Mo. 13; 70 Mo. 685; *First National Bank v. Bank*, 170 N. Y. 88; 62 N. E. 1089; *McLaughlin v. Braddy*, 63 S. C. 433; 90 Am. St. Rep. 681; 41 S. E. 523; (*Tradesmen's, etc., Bank*) *Bank v. Looney*, 99 Tenn. 278; 63 Am. St. Rep. 830; 38 L. R. A. 837; 42 S. W. 149.

³ *Vinton v. King*, 4 All. (Mass.) 562; *Farmers', etc., Bank v. Butler*, 48 Mich. 192; 12 N. W. 36; *Keller v. Schmidt*, 104 Wis. 596; 80

N. W. 935. *Contra*, *Palmer v. Poor*, 121 Ind. 135; 6 L. R. A. 469; 22 N. E. 984. (But in this case the evidence showed that there was no delivery, the note being forcibly taken from the maker by the payee.) *Barry v. Assurance Society*, 59 N. Y. 587.

⁴ *Credit Co. v. Machine Co.*, 54 Conn. 357; 1 Am. St. Rep. 123; 8 Atl. 472; *Thompson v. West*, 59 Neb. 677; 49 L. R. A. 337; 82 N. W. 13.

⁵ *Toms v. Jones*, 127 N. C. 464; 37 S. E. 480.

⁶ *Gray, etc., Co. v. Bank*, 109 Ky. 694; 60 S. W. 537.

⁷ *Benton County Savings Bank v. Boddicker*, 105 Ia. 548; 67 Am. St. Rep. 310; 45 L. R. A. 321; 75 N. W. 632.

⁸ *Siebe v. Machine Works*, 86 Cal. 390; 25 Pac. 14; *Parr v. Erickson*, 115 Ga. 873; 42 S. E. 240; *Martina v. Muhlke*, 186 Ill. 327; 57 N. E. 954; *Bankers', etc., Bank v. Lathe Co. (Ia.)*, 90 N. W. 612; *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477; 13 Atl. 336; *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577; 58 N. E. 162; *Bear-den v. Moses*, 7 Lea (Tenn.) 459; *Salisbury v. Stewart*, 15 Utah 308; 62 Am. St. Rep. 934; 49 Pac. 777.

ment in blank by a prior holder for collection,⁹ usury,¹⁰ gambling,¹¹ that the note was given to an unlicensed physician for professional services,¹² or was given to a foreign corporation which has not complied with the law authorizing it to do business in that state,¹³ fraud against the creditors of the maker,¹⁴ or discharge as by failure of consideration,¹⁵ payment,¹⁶ or a contract by a prior holder with the maker giving an extension of time which would release sureties as to such holder,¹⁷ are defenses none of which can be interposed as against a *bona fide* holder for value. So if a negotiable instrument payable in legal effect to bearer is stolen after delivery, it is valid in the hands of a *bona fide* holder.¹⁸

§1296. Defenses available against a bona fide holder.—Want of capacity.

There are certain defenses, however, which may be made even against a *bona fide* holder for value. Any defense which goes to the capacity of the party against whom the liability is sought to be enforced, may be made. Thus infancy,¹ insanity,²

⁹ Coors v. Bank, 14 Colo. 202; 7 L. R. A. 845; 23 Pac. 328.

¹⁰ Hamilton v. Fowler, 99 Fed. 18; 40 C. C. A. 47; Newman v. Blades (Ky.), 54 S. W. 849; Lynchburg National Bank v. Scott, 91 Va. 652; 50 Am. St. Rep. 860; 29 L. R. A. 827; 22 S. E. 487.

¹¹ Wirt v. Stubblefield, 17 App. D. C. 283.

¹² Citizens' State Bank v. Nore, — Neb. —; 60 L. R. A. 737; 93 N. W. 160.

¹³ National Bank v. Pick. — N. D. —; 99 N. W. 63.

¹⁴ Holmes v. Gardner, 50 O. S. 167; 20 L. R. A. 329; 33 N. E. 644.

¹⁵ King v. Bank, 127 Ala. 266; 28 So. 658; English-American, etc., Co. v. Hiers, 112 Ga. 823; 38 S. E. 103; First National Bank v. Skeen,

101 Mo. 683; 11 L. R. A. 748; 14 S. W. 732; Mayer v. Heidelberg, 123 N. Y. 332; 9 L. R. A. 850; 25 N. E. 416; Payne v. Zell, 98 Va. 294; 36 S. E. 379.

¹⁶ Hunter v. Clarke, 184 Ill. 158; 75 Am. St. Rep. 160; 56 N. E. 297; Rice v. Jones, 103 N. C. 226; 14 Am. St. Rep. 801; 9 S. E. 571.

¹⁷ Nelson v. Brown, 140 Mo. 580; 62 Am. St. Rep. 755; 41 S. W. 960.

¹⁸ Manhattan Savings Institution v. Bank, 170 N. Y. 58; 88 Am. St. Rep. 640; 62 N. E. 1079.

¹ Howard v. Simpkins, 70 Ga. 322.

² American Trust Co. v. Boone, 102 Ga. 202; 66 Am. St. Rep. 167; 40 L. R. A. 250; 29 S. E. 182; McClain v. Davis, 77 Ind. 419. *Contra*, Moore v. Hershey, 90 Pa. St. 196. If A signs a note as accommo-

and imbecility,³ may be set up against a *bona fide* holder whenever such defenses could have been set up against the original payee. Voluntary intoxication has, however, been held not to be a valid defense against a *bona fide* holder.⁴ Coverture may be interposed as a defense against a *bona fide* holder.⁵

§1297. Want of execution.

Any defense which goes to the execution of the instrument, and shows that no instrument was ever in fact executed, may be made.¹ Thus if the instrument is never delivered, and passes into the possession of the payee without the fault of the maker, as where it was drawn for practice, and taken by the payee without the maker's knowledge,² or is taken by the payee without the maker's consent before he is ready to deliver it,³ the maker may defend against a *bona fide* holder. There are some authorities, however, which hold that in such cases the maker is liable to a *bona fide* holder even if he is free from negligence in allowing the payee to take possession of the instrument,⁴ as where the instrument is taken from him forcibly,⁵ or is stolen from him.⁶ In these last cases, however, it does

dation indorser while sane and renews when insane, the payee being ignorant of his insanity, A is liable. *Bank v. Sneed*, 97 Tenn. 120; 56 Am. St. Rep. 788; 34 L. R. A. 274; 36 S. W. 716.

³ *Hosler v. Beard*, 54 O. S. 398; 56 Am. St. Rep. 720; 35 L. R. A. 161; 43 N. E. 1040.

⁴ *State Bank v. McCoy*, 69 Pa. St. 204; 8 Am. Rep. 246.

⁵ Married woman surety for husband contrary to statute. *Voreis v. Nusbaum*, 131 Ind. 267; 16 L. R. A. 45; 31 N. E. 70. Note by married woman to husband, even if indorsed for debt of wife. *National Granite Bank v. Tyndale*, 176 Mass. 547; 51 L. R. A. 447; 57 N. E. 1022; *National Granite Bank v.*

Whicher, 173 Mass. 517; 73 Am. St. Rep. 317; 53 N. E. 1004.

¹ *Vannatta v. Lindley*, 198 Ill. 40; 64 N. E. 735.

² *Salley v. Terril*, 95 Me. 553; 85 Am. St. Rep. 433; 55 L. R. A. 730; 50 Atl. 896.

³ *Burson v. Huntington*, 21 Mich. 415; 4 Am. Rep. 497; *Branch v. Sinking Fund*, 80 Va. 427; 56 Am. Rep. 596.

⁴ *Clarke v. Johnson*, 54 Ill. 296; *Kinyon v. Wohlford*, 17 Minn. 239; 10 Am. Rep. 165.

⁵ *Clarke v. Johnson*, 54 Ill. 296.

⁶ *Shipley v. Carroll*, 45 Ill. 285. So of bank-notes. *Worcester County Bank v. Bank*, 10 Cush. (Mass.) 488; 57 Am. Dec. 120; or treasury-notes, *Cooke v. United States*, 91 U. S. 389.

not always appear affirmatively that the maker was free from negligence; though that inference must be drawn from the facts appearing in the opinions. If the maker has been negligent, and thereby has allowed the instrument to come into the possession of the payee, he is liable to a *bona fide* holder, on principles of estoppel, though as between himself and the payee no delivery took place.⁷ Even where negligence does not exist, the maker is liable to a *bona fide* holder on negotiable instruments not delivered by him which are put into circulation by one to whom the maker has voluntarily entrusted their custody. Thus if the maker allows the payee to take possession of the instrument upon the understanding that it is to take effect only if others sign it, he cannot defend against a *bona fide* holder to whom it passes without such signature,⁸ though he could interpose such defense against the payee.⁹ So if a note is deposited in escrow and is delivered in breach of the conditions of delivery and without the knowledge of the maker, he is liable thereon to a *bona fide* holder.¹⁰ If a maker signs a note by reason of operative mistake, misrepresentation or fraud in the execution,¹¹ he may interpose such defense even as against a *bona fide* holder, if he has not been negligent in so signing it.¹² Some authorities, however, hold that the maker is liable in such cases to a *bona fide* holder even if he was free from negligence.¹³ If the maker is negligent in executing the in-

⁷ *Dodd v. Dunne*, 71 Wis. 578; 37 N. W. 430.

⁸ *Micklewait v. Noel*, 69 Ia. 344; 28 N. W. 630; *Smith v. Moberly*, 10 B. Mon. (Ky.) 266; 52 Am. Dec. 543; *First National Bank of Freeport v. Mfg. Co.*, 61 Minn. 274; 63 N. W. 731; *Porter v. Andrews*, 10 N. D. 558; 88 N. W. 567; *Lookout Bank v. Aull*, 93 Tenn. 645; 42 Am. St. Rep. 934; 27 S. W. 1014.

⁹ See § 595.

¹⁰ *Graff v. Logue*, 61 Ia. 704; 17 N. W. 171; *Chase National Bank v. Faurot*, 149 N. Y. 532; 35 L. R. A. 605; 44 N. E. 164. *Contra*, *Chip-*

man v. Tucker, 38 Wis. 43; 20 Am. Rep. 1.

¹¹ See § 66.

¹² *Cline v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357; *Green v. Wilkie*, 98 Ia. 74; 60 Am. St. Rep. 184; 36 L. R. A. 434; 66 N. W. 1046; *Gibbs v. Linabury*, 22 Mich. 479; 7 Am. Rep. 675; *Willard v. Nelson*, 35 Neb. 651; 37 Am. St. Rep. 455; 53 N. W. 572; *De Camp v. Hamma*, 29 O. S. 467; *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548.

¹³ *Rowland v. Fowler*, 47 Conn. 347; *First National Bank of Parkersburg v. Johns*, 22 W. Va. 520; 46 Am. Rep. 506.

strument without knowing its contents, he is liable to a *bona fide* holder of the instrument.¹⁴ Thus where A knew that B had tried to defraud him by an alleged order for lightning-rods, and A, who cannot read, relies further on B's representations and signs a note, understanding that it is to be non-negotiable, A is liable thereon to a *bona fide* holder by reason of his negligence in trusting B after knowing that B was trying to defraud him.¹⁵ Irrespective of questions of negligence, the maker may be estopped as to *bona fide* holders by his own conduct in delivering an instrument to the wrong party. Thus X represented himself to be A, the traveling agent of Y. X telegraphed to Y, using A's name, to send him fifty dollars by telegraph. Y did so. The telegraph company drew a check to A and delivered it to X. While there was such a mistake as to the identity of the parties as would make the contract void between them, and while X was obliged to forge A's name, in indorsing the check, it was held that as against a *bona fide* indorsee, the telegraph company was estopped from denying that X was the true payee.¹⁶

§1298. Alteration.

The defense that the instrument was materially altered after the delivery, may be set up against a *bona fide* holder for value, where it is not the negligence of the maker that has made such alteration possible.¹ If the negligence of the maker has

¹⁴ *Bedell v. Herring*, 77 Cal. 572; 11 Am. St. Rep. 307; 20 Pac. 129; *Ruddell v. Phalar*, 72 Ind. 533; 37 Am. Rep. 177; *Wright v. Flinn*, 33 Ia. 159; *Willard v. Nelson*, 35 Neb. 651; 37 Am. St. Rep. 455; 53 N. W. 572; *Ross v. Doland*, 29 O. S. 473; *Keller v. Schmidt*, 104 Wis. 596; 80 N. W. 935.

¹⁵ *Keller v. Schmidt*, 104 Wis. 596; 80 N. W. 935.

¹⁶ *Burrows v. Telegraph Co.*, 86 Minn. 499; 91 Am. St. Rep. 380; 58 L. R. A. 433; 99 N. W. 1111.

¹ *Exchange National Bank v.*

Bank, 58 Fed. 140; 22 L. R. A. 686; *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18; 3 S. W. 892; *Young v. Baker*, 29 Ind. App. 130; 64 N. E. 54; *Simmons v. Lamp-ton Co.*, 69 Miss. 862; 23 L. R. A. 599; 12 So. 263; *Erickson v. Bank*, 44 Neb. 622; 28 L. R. A. 577; 62 N. W. 1078; *Porter v. Hardy*, 10 N. D. 551; 88 N. W. 458; *Newman v. King*, 54 O. S. 273; 56 Am. St. Rep. 705; 35 L. R. A. 471; 43 N. E. 683; *Citizens' National Bank v. Wil-liams*, 174 Pa. St. 66; 35 L. R. A. 464; 34 Atl. 303.

made such alteration possible,² as where he has left blanks in the instrument which have been filled so as to make an apparent contract different from the real contract entered into by the maker,³ or where he has written a material part of the contract on such a part of the paper that it can be detached from the rest of the paper easily and without chance of detection,⁴ he has been held liable to a *bona fide* holder on principles of estoppel. Some authorities, however, hold that even if the maker is negligent in giving opportunity for alteration, he is not liable in case of material alteration even to a *bona fide* holder.⁵ The ultimate view of the Iowa courts, however, seems to be that negligence on the part of the maker may estop him, in case an altered note passes to a *bona fide* holder, but that leaving a blank in a note is not negligence as a matter of law, but is merely a circumstance to be considered in determining the presence or absence of negligence.⁶

§1299. Defenses permitted by statute.

Any defense which is allowed, either expressly or by statute, or by the necessary effect of a statute, may be made. So under a statute allowing "immoral and illegal considerations" to be interposed as a defense against a *bona fide* holder, a contract to stifle criminal prosecution is a defense to a note given there-

² *Merritt v. Boyden*, 191 Ill. 136; 85 Am. St. Rep. 246; 60 N. E. 907; *Trigg v. Taylor*, 27 Mo. 245; 72 Am. Dec. 263; *Garrard v. Hadden*, 67 Pa. St. 82; 5 Am. Rep. 412.

³ *Winter v. Pool*, 104 Ala. 580; 16 So. 543; *Merritt v. Boyden*, 191 Ill. 136; 85 Am. St. Rep. 246; 60 N. E. 907; *Cason v. Bank*, 97 Ky. 487; 53 Am. St. Rep. 418; 31 S. W. 40; *Weidman v. Symes*, 120 Mich. 657; 77 Am. St. Rep. 603; 79 N. W. 894.

⁴ *Noll v. Smith*, 64 Ind. 511; 31 Am. Rep. 131; *Brown v. Reed*, 79 Pa. St. 370; 21 Am. Rep. 75. *Contra*, *Wait v. Pomeroy*, 20 Mich. 425; 4 Am. Rep. 395.

⁵ *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18; 3 S. W. 892; *Knoxville National Bank v. Clark*, 51 Ia. 264; 33 Am. Rep. 129; 1 N. W. 491; *Burrows v. Klunk*, 70 Md. 451; 14 Am. St. Rep. 371; 3 L. R. A. 576; 17 Atl. 378; *Searles v. Seipp*, 6 S. D. 472; 61 N. W. 804.

⁶ *Conger v. Crabtree*, 88 Ia. 536; 45 Am. St. Rep. 249; 55 N. W. 335. If alteration by stranger to contract, *bona fide* holder may recover on original consideration. *Walsh v. Hunt*, 120 Cal. 46; 39 L. R. A. 697; 52 Pac. 115. If by party, no recovery. *Schwartz v. Wilmer*, 90 Md. 136; 44 Atl. 1059; *Moss v. Maddux*, 108 Tenn. 405; 67 S. W. 855.

under.¹ Thus statutes which make notes void when given on a gambling consideration,² or as usury,³ or for intoxicating liquors,⁴ or by Federal Statute, for land leased from Indians,⁵ or omitting such words as "peddlers' note"⁶ or "given for a patent right,"⁷ permit such defenses to be set up against *bona fide* holders for value. Even under such statutes the maker may estop himself from setting up such defense by stating to the prospective indorsee before the purchase that the note is valid.⁸

§1300. Holder not bona fide acquires rights of assignor.

If A holds a negotiable instrument under circumstances which make him a *bona fide* holder, and he transfers it regularly to B, who takes with notice, B takes all the rights of A,¹ unless B has held the instrument before A under circum-

¹ Jones v. Dannenberg Co., 112 Ga. 426; 52 L. R. A. 271; 37 S. E. 729.

² Pope v. Hanke, 155 Ill. 617; 28 L. R. A. 568; 40 N. E. 839; Irwin v. Marquet, 26 Ind. App. 383; 84 Am. St. Rep. 297; 59 N. E. 38; Snoddy v. Bank, 88 Tenn. 573; 17 Am. St. Rep. 918; 7 L. R. A. 705; 13 S. W. 127; Swinney v. Edwards, 8 Wyom. 54; 80 Am. St. Rep. 916; 55 Pac. 306. But a statute applying to certain forms of wagers but not to sales without intention of delivering does not make a note given thereunder void in the hands of a *bona fide* holder. Sondheim v. Gilbert, 117 Ind. 71; 10 Am. St. Rep. 23; 5 L. R. A. 432; 18 N. E. 687; Crawford v. Spencer, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713.

³ Clarke v. Havard, 111 Ga. 242; 51 L. R. A. 499; 36 S. E. 837; Faison v. Grandy, 128 N. C. 438; 38 S. E. 897; Ward v. Sugg, 113 N. C. 489; 24 L. R. A. 280; 18 S. E. 717.

⁴ Streit v. Sanborn, 47 Vt. 702.

⁵ Larson v. Bank, 62 Neb. 303; 87 N. W. 18.

⁶ Nunn v. Bank, 107 Ky. 262; 53 S. W. 665.

⁷ Wyatt v. Wallace, 67 Ark. 575; 55 S. W. 1105. Under most statutes requiring a note given for a patent right to recite that fact the omission of these words does not affect a *bona fide* holder. Smith v. Wood, 111 Ga. 221; 36 S. E. 649; Tescher v. Merea, 118 Ind. 586; 21 N. E. 316; Haskell v. Jones, 86 Pa. St. 173.

⁸ Pritchett v. Ahrens, 26 Ind. App. 56; 84 Am. St. Rep. 274; 59 N. E. 42.

¹ Gunnison County v. Rollins, 173 U. S. 255; Pickens Township v. Post, 99 Fed. 659; 41 C. C. A. 1; Burch v. Pope, 114 Ga. 334; 40 S. E. 227; Riegel v. Ormsby, 111 Ia. 10; 82 N. W. 432; Kelly v. Staed, 136 Mo. 430; 58 Am. St. Rep. 648; 37 S. W. 1110; Knight v. Finney, 59 Neb. 274; 80 N. W. 912; Vosburgh v. Diefendorf, 119 N. Y. 357; 16 Am. St. Rep. 836; 23 N. E. 801; Herman v. Gunter, 83 Tex. 66; 29 Am. St. Rep. 632; 18 S. W. 428.

stances which did not make him a *bona fide* holder, as where he was the original payee.² So a transfer after maturity passes the right of the transferrer. Hence if the latter took the note before maturity under circumstances making him a *bona fide* holder, his transferee has all the rights of a *bona fide* holder,³ unless the transferee is a prior party to the instrument who was not himself a *bona fide* holder,⁴ or takes as agent of the original payee.⁵

§1301. Who is a *bona fide* holder.—Taking without notice.

The important question in negotiable contracts is, therefore, whether it is in the hands of a *bona fide* holder. The holder must take without notice of the defense sought to be interposed, to constitute him a *bona fide* holder. If he has notice of defense he is not a *bona fide* holder even if he pays full value.¹ Thus if the holder knows that a surety executed a note for the purpose of having it discounted for value, and that it has been endorsed without consideration,² or that an indorser for accom-

² Sawyer v. Wiswell, 9 All. (Mass.) 39; Hoyer v. Kalashian, 22 R. I. 101; 46 Atl. 271; Andrews v. Robertson, 111 Wis. 334; 87 Am. St. Rep. 870; 54 L. R. A. 673; 87 N. W. 190.

³ Bank of Sonoma County v. Gove, 63 Cal. 355; 49 Am. Rep. 92; Thomas v. Ruddell, 66 Ind. 326; Edgerly v. Lawson, 176 Mass. 551; 51 L. R. A. 432; 57 N. E. 1020; Carpenter v. Greenop, 74 Mich. 664; 16 Am. St. Rep. 662; 42 N. W. 276; Lewis v. Long, 102 N. C. 206; 11 Am. St. Rep. 725; 9 S. E. 637. So under R. S. § 3173 of Ohio, prior to the negotiable instruments act; Sherman v. Investment Co., 19 Ohio C. C. 26; 10 Ohio C. D. 33. This rule is re-enacted R. S. § 3173c of Ohio.

⁴ Kost v. Bender, 25 Mich. 515.

⁵ Battersbee v. Calkins, 128 Mich. 569; 87 N. W. 760.

¹ Hanauer v. Doane, 12 Wall. (U.

S.) 342; Braly v. Henry, 71 Cal. 481; 60 Am. Rep. 543; 11 Pac. 385; 12 Pac. 623; Heard v. Shedden, 113 Ga. 162; 38 S. E. 387; Wray v. Warner, 111 Ia. 64; 82 N. W. 455; Brook v. Teague, 52 Kan. 119; 34 Pac. 347; Maitland v. Bank, 40 Md. 540; 17 Am. Rep. 620; Fisher v. Leland, 4 Cush. (Mass.) 456; 50 Am. Dec. 805; McNamara v. Gargett, 68 Mich. 454; 13 Am. St. Rep. 355; 36 N. W. 218; Swinney v. Patterson, 25 Nev. 411; 62 Pac. 1; Greenville v. Ormand, 51 S. C. 58; 64 Am. St. Rep. 663; 39 L. R. A. 847; 28 S. E. 50; Hickerson v. Raiguel, 2 Heisk. (Tenn.) 329; Gregg v. Groesbeck, 11 Utah 310; 32 L. R. A. 266; 40 Pac. 202.

² Greenville v. Ormand, 51 S. C. 58; 64 Am. St. Rep. 663; 39 L. R. A. 847; 28 S. E. 50.

modation has ordered that his name should be erased before the note was negotiated,³ he cannot enforce the note against such party. The mere fact, however, that the circumstances are such as would suggest suspicion, and that if the holder had made such inquiries as a prudent man would have made, he would have learned of the defense, does not prevent him from being a *bona fide* holder.⁴ The facts must create a "presumption that he knew facts impeaching its validity."⁵ This result has not been reached without a vigorous conflict. The original English rule was in accordance with that laid down in the text.⁶ Subsequently Lord Tenterden expressed the view that one who takes a negotiable instrument under circumstances that would arouse the suspicions of a reasonable and prudent man cannot be a technical *bona fide* holder.⁷ This decision had a depressing effect on the value of English paper on the continent, and after taking the intermediate position that gross negligence, and that alone, could operate to prevent one who took without notice from being a *bona fide* holder,⁸ the English courts adopted the original rule.⁹ Direct evidence of bad faith is not necessary however. The fact that the holder takes under circumstances

³ Gregg v. Groesbeck, 11 Utah 310; 32 L. R. A. 266; 40 Pac. 202.

⁴ Swift v. Smith, 102 U. S. 442; Credit Co. v. Machine Co., 54 Conn. 357; 1 Am. St. Rep. 123; 8 Atl. 472; Merritt v. Boyden, 191 Ill. 136; 60 N. E. 907; Richards v. Monroe, 85 Ia. 359; 39 Am. St. Rep. 301; 52 N. W. 339; International Trust Co. v. Wilson, 161 Mass. 80; 36 N. E. 589; Rosemond v. Graham, 54 Minn. 323; 40 Am. St. Rep. 336; 56 N. W. 38; Borgess Investment Co. v. Vette, 142 Mo. 560; 64 Am. St. Rep. 567; 44 S. W. 754; Second National Bank v. Weston, 161 N. Y. 520; 76 Am. St. Rep. 283; 55 N. E. 1080; Clarion Second National Bank v. Morgan, 165 Pa. St. 199; 44 Am. St. Rep. 652; 30 Atl. 957; Phelan v. Moss, 67 Pa. St. 59; 5 Am. Rep. 402. "The

rights of the holder are to be determined by the simple test of honesty and good faith, and not by speculative views as to his diligence or negligence." Cheever v. R. R., 150 N. Y. 59; 55 Am. St. Rep. 646; 34 L. R. A. 69; 44 N. E. 701.

⁵ Sinkler v. Siljan, 136 Cal. 356; 68 Pac. 1024.

⁶ Peacock v. Rhodes, Douglass 633.

⁷ Gill v. Cubitt, 3 B. & C. 466. Some of the earlier American decisions inclined to this rule. Adkins v. Blake, 2 J. J. Mar. (Ky.) 40; Merritt v. Duncan, 7 Heisk. (Tenn.) 156; 19 Am. Rep. 612.

⁸ Crook v. Jadis, 5 B. & Ad. 909.

⁹ Goodman v. Harvey, 4 Ad. & El. 870.

which should arouse suspicion, or is guilty of gross negligence is a circumstance to be considered in determining whether he takes in good faith. The transferee may know facts extrinsic to the note which raise so strong an inference of its irregularity that a finding of fact that he did not take in good faith may be warranted.¹⁰ Thus if the transferee knows that the note was given for "Hull-less oats" and that the "Hull-less oats" scheme as operated by the Hull-less Oats company, the payee, is a fraud,¹¹ or if he knows that the amount of the note is disproportionately large for the means of the maker,¹² or if he knows that the maker and his sons have been under arrest on a charge of murder that the payee is their attorney and that the amount of the note is exorbitant,¹³ or that his indorser is a gambler, the certificate of deposit being sold at much less than its face value,¹⁴ such knowledge may justify a finding of bad faith as a fact. The holder is charged with notice of everything that appears from the contents of the instrument.¹⁵ Thus if an agent pays personal debts with a check of his principals,¹⁶ or a partner discounts a note given by the firm and has the proceeds deposited to his individual account,¹⁷ or if a note appears on its face to have been issued by an unauthorized agent,¹⁸ one who takes with knowledge of such facts is bound at his peril to ascertain the authority of the agent or

¹⁰ *Shirk v. Neible*, 156 Ind. 66; 83 Am. St. Rep. 150; 59 N. E. 281; *Goodrich v. McDonald*, 77 Mich. 486; 43 N. W. 1019; *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191; 10 L. R. A. 676; 25 N. E. 402; *Dunn v. Bank*, 15 S. D. 454; 90 N. W. 1045.

¹¹ *Griffith v. Shipley*, 74 Md. 591; 14 L. R. A. 405; 22 Atl. 1107. For a similar case involving a Bohemian oats note, see *McNamara v. Gargett*, 68 Mich. 454; 13 Am. St. Rep. 305; 36 N. W. 218.

¹² *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191; 10 L. R. A. 676; 25 N. E. 402.

¹³ *Shirk v. Neible*, 156 Ind. 66;

83 Am. St. Rep. 150; 59 N. E. 281.

¹⁴ *Dunn v. Bank*, 15 S. D. 454; 90 N. W. 1045.

¹⁵ A holder of municipal bonds. *Wilbur v. Wyatt*, 63 Neb. 261; 88 N. W. 499.

¹⁶ *Lamson v. Beard*, 94 Fed. 30; 45 L. R. A. 822; *Gerard v. McCormick*, 130 N. Y. 261; 14 L. R. A. 234; 29 N. E. 115.

¹⁷ *Brown v. Pettit*, 178 Pa. St. 17; 56 Am. St. Rep. 742; 34 L. R. A. 723; 35 Atl. 865.

¹⁸ *Chemical National Bank v. Wagner*, 93 Ky. 525; 40 Am. St. Rep. 206; 20 S. W. 535. (Payable to himself.)

partner to make such use of the funds. So where a note shows that a bank indorsed it out of the chain of title and before delivery, the holder is bound to inquire whether such indorsement is not *ultra vires*.¹⁹ So memoranda on an instrument showing that it had been refused discount at the bank at which it was payable,²⁰ or that it is "to be held as collateral"²¹ operate as notice. But a memorandum "C. I. P." on the face of a note is not notice that it was given for a patent right so as to be subject to defenses.²² The fact that default has been made in payment of interest,²³ or in one of a series of notes,²⁴ is not notice. So the fact that the consideration is recited on the face of the note,²⁵ or is known to the holder,²⁶ is not notice of any defenses arising by reason of failure of the consideration, unless the holder knows that the consideration has failed,²⁷ or must fail.²⁸ Analogous to this last question is one often presented in slightly differing forms under modern methods of business. A consigns goods, takes a bill of lading, and attaches it to a

¹⁹ *National Park Bank v. Warehouse Co.*, 116 N. Y. 281; 5 L. R. A. 673; 22 N. E. 567.

²⁰ *Fowler v. Brantly*, 14 Pet. (U. S.) 318.

²¹ *National Security Bank v. McDonald*, 127 Mass. 82.

²² *First National Bank v. Stockell*, 92 Tenn. 252; 20 L. R. A. 605; 21 S. W. 523. ("C. I. P." meaning "Chapin's Iron Process.")

²³ *Cooper v. Bank*, 21 Ind. App. 358; 69 Am. St. Rep. 365; 50 N. E. 775; *United States National Bank v. Floss*, 38 Or. 68; 84 Am. St. Rep. 752; 62 Pac. 751. *Contra*, *First National Bank v. Forsyth*, 67 Minn. 257; 64 Am. St. Rep. 415; 69 N. W. 909.

²⁴ *Bank v. Mfg. Co.*, 52 Fed. 98; 18 L. R. A. 201. *Contra*, *Harrell v. Broxton*, 78 Ga. 129; 3 S. E. 5.

²⁵ *Bank v. Barrett*, 38 Ga. 126; 95 Am. Dec. 384; *Siegel v. Bank*, 131 Ill. 569; 19 Am. St. Rep. 51; 7 L. R. A. 537; 23 N. E. 417;

Heard v. Bank, 8 Neb. 10; 30 Am. Rep. 811.

²⁶ *Siegel v. Bank*, 131 Ill. 569; 19 Am. St. Rep. 51; 7 L. R. A. 537; 23 N. E. 417; *Miller v. Ottaway*, 81 Mich. 196; 21 Am. St. Rep. 513; 8 L. R. A. 428; 45 N. W. 665; *Jennings v. Todd*, 118 Mo. 296; 40 Am. St. Rep. 373; 24 S. W. 148; *Nebraska National Bank v. Pennock*, 55 Neb. 188; 75 N. W. 554; *Rublee v. Davis*, 33 Neb. 779; 29 Am. St. Rep. 509; 51 N. W. 135; *Tradesmen's National Bank v. Curtis*, 167 N. Y. 194; 52 L. R. A. 430; 60 N. E. 429; *Davis v. McCready*, 17 N. Y. 230; 72 Am. Dec. 461; *United States National Bank v. Floss*, 38 Or. 68; 84 Am. St. Rep. 752; 62 Pac. 751.

²⁷ *Jennings v. Todd*, 118 Mo. 296; 40 Am. St. Rep. 373; 24 S. W. 148.

²⁸ *Russ Lumber Co. v. Water Co.*, 120 Cal. 521; 65 Am. St. Rep. 186; 52 Pac. 995. (Where the consideration is a promise made by a cor-

draft. The draft is accepted by the drawee in reliance on the bill of lading. Either before or after acceptance it is indorsed over to a *bona fide* purchaser. Is the bill of lading a part of the draft; or is it notice to the indorsee of the entire transaction? The question becomes material if the quality or title of the goods covered by the bill of lading is defective. In such case the drawee either tries to avoid paying the draft or if he has paid it to the indorsee, he seeks to recover such payment. The weight of authority is that the bill of lading is neither part of the draft nor notice to the indorsee of the entire transaction; and accordingly such defect in quality or in title creates no liability against him.²⁹ Under this view the acceptor is liable to the payee.³⁰ If the acceptor has paid the bill of exchange and the property covered by the bill of lading is then attached, he cannot recover such payment.³¹ A minority of the courts hold that such defense can be interposed by the acceptor.³² Of these cases *Landa v. Lattin*, decided by an intermediate court,³³ has been overruled by the court of last resort of that state.³⁴ Indorsement "for collection" is notice that the holder is not the beneficial owner,³⁵ even if such indorsement has been erased,

poration which has become insolvent.)

²⁹ *Goetz v. Bank*, 119 U. S. 551; *Tolerton v. Bank*, 112 Ia. 706; 50 L. R. A. 777; 84 N. W. 930; *Hall v. Keller*, 64 Kan. 211; 91 Am. St. Rep. 209; 67 Pac. 518. This case holds that the defenses of the consignee remain the same against the transferee as against the assignor. 67 Mo. App. 677; *Columbian Bank v. White*, 65 Mo. App. 677; *S. Blaisdell, Jr. Co. v. Bank*, 96 Tex. 626; 97 Am. St. Rep. 944; 75 S. W. 292.

³⁰ *S. Blaisdell Jr. Co. v. Bank*, 96 Tex. 626; 97 Am. St. Rep. 944; 75 S. W. 292.

³¹ *Hall v. Keller*, 64 Kan. 211; 91 Am. St. Rep. 209; 67 Pac. 518.

³² *Finch v. Gregg*, 126 N. C. 176; 49 L. R. A. 679; 35 S. E. 251;

Landa v. Lattin, 19 Tex. Civ. App. 246; 46 S. W. 48.

³³ 19 Tex. Civ. App. 246; 46 S. W. 48.

³⁴ *S. Blaisdell Jr. v. Bank*, 96 Tex. 626; 97 Am. St. Rep. 944; 75 S. W. 292.

³⁵ *Moore v. Bank*, 44 La. Ann. 99; 32 Am. St. Rep. 332; 10 So. 407; *Freeman's National Bank v. Tube Works Co.*, 151 Mass. 413; 21 Am. St. Rep. 461; 8 L. R. A. 42; 24 N. E. 779; *Manufacturers' National Bank v. Bank*, 148 Mass. 553; 2 L. R. A. 699; 20 N. E. 193; *National, etc., Bank v. Hubbell*, 117 N. Y. 384; 15 Am. St. Rep. 515; 7 L. R. A. 852; 22 N. E. 1031; *National Bank v. Bank*, 58 O. S. 207; 65 Am. St. Rep. 748; 41 L. R. A. 584; 50 N. E. 723.

as long as it is still legible.³⁶ Indorsement "for account" of indorsers has been held to have the same effect;³⁷ but "for deposit to the credit of" the indorser has been held not to have this effect but to make the indorsee the absolute owner.³⁸ Since accommodation paper is intended as a loan of credit by the accommodation party, one who takes such paper with notice that it is accommodation paper is, not thereby charged with notice of defects.³⁹ The fact that by oversight a note issued while the War Revenue Act was in force was unstamped is not notice of defenses.⁴⁰ The fact that the indorsee required a very full guaranty from his indorser does not show as a matter of law that he had notice of defenses.⁴¹ An indorsement without recourse is not notice of defenses.⁴² A note of a principal, payable to the agent executing it,⁴³ or to a former president of such corporation,⁴⁴ or a note of a partnership payable to a member of the firm,⁴⁵ is not in either case notice of any irregularity in the execution. Notice by publication in a newspaper is not notice to one who is not shown to have actually known thereof.⁴⁶ Notice to an agent of the holder of defenses,⁴⁷ such as want of con-

³⁶ Cussen v. Brandt, 97 Va. 1; 75 Am. St. Rep. 762; 32 S. E. 791.

³⁷ United States National Bank v. Geer, 55 Neb. 462; 70 Am. St. Rep. 390; 41 L. R. A. 444; 75 N. W. 1088.

³⁸ Ditch v. Bank, 79 Md. 192; 47 Am. St. Rep. 375; 23 L. R. A. 164; 29 Atl. 72, 138. (Decided by a divided court.)

³⁹ Evans v. Hardware Co., 65 Ark. 204; 67 Am. St. Rep. 919; 45 S. W. 370; Baker v. Bank, 63 Neb. 801; 93 Am. St. Rep. 484; 89 N. W. 269.

⁴⁰ Ebert v. Gitt, 95 Md. 186; 52 Atl. 900; Burson v. Huntington, 21 Mich. 415; 4 Am. Rep. 497.

⁴¹ Cover v. Myers, 75 Md. 406; 32 Am. St. Rep. 394; 23 Atl. 850.

⁴² Hamilton v. Fowler, 99 Fed. 18; 40 C. C. A. 47; Evans v. Hard-

ware Co., 65 Ark. 204; 67 Am. St. Rep. 919; 45 S. W. 370; Stevenson v. O'Neal, 71 Ill. 314; Borden v. Clark, 26 Mich. 410; First National Bank v. Bank, 34 Neb. 71; 33 Am. St. Rep. 618; 15 L. R. A. 386; 51 N. W. 305; Bisbing v. Graham, 14 Pa. St. 14; 53 Am. Dec. 510.

⁴³ Africa v. Tribune Co., 82 Minn. 283; 83 Am. St. Rep. 424; 84 N. W. 1019; Cheever v. R. R., 150 N. Y. 59; 55 Am. St. Rep. 646; 34 L. R. A. 69; 44 N. E. 701.

⁴⁴ Jones v. Stoddart, — Ida. —; 67 Pac. 650.

⁴⁵ Second National Bank v. Weston, 161 N. Y. 520; 76 Am. St. Rep. 283; 55 N. E. 1080.

⁴⁶ English-American, etc., Co. v. Hiers, 112 Ga. 823; 38 S. E. 103.

⁴⁷ Shedden v. Heard, 110 Ga. 461; 35 S. E. 707; Roberts v. Tavenner, 48 W. Va. 632; 37 S. E. 576.

sideration⁴⁸ is notice to the principal if within the scope of the agent's authority. Thus if a mortgagor sells the mortgaged property as agent of the mortgagee and makes false statements about such property to the vendee to induce him to buy, the mortgagee, when taking a check for such property indorsed over by the mortgagor, does not take without notice.⁴⁹ One who holds a note as collateral before notice and buys it after notice,⁵⁰ or who has made some advances before notice and other advances after notice,⁵¹ does not take as a *bona fide* holder as to what he pays after notice. An instrument purporting on its face to be executed by the officer of a corporation,⁵² or to be accepted,⁵³ or indorsed,⁵⁴ by a public officer, is notice to subsequent holders sufficient to put them on inquiry as to the powers of such officers. Whether the addition of "trustee" or some word of similar import to the name of the payee is notice to those claiming under him by indorsement is a question on which there has been a division of authority. The weight of authority holds that the addition of "trustee"⁵⁵ or "guardian,"⁵⁶ is notice to subsequent holders that other persons have equities in such instruments. In other jurisdictions the addition of "trustee,"⁵⁷ or "agent,"⁵⁸ or "sheriff,"⁵⁹ has been held not to amount to notice. Notice of one defect does not prevent a holder from taking without notice as to other defects and hence being, as to them, a *bona fide* holder. Thus a notice that a note is given for a patent right does not prevent a holder from taking free from a defense

⁴⁸ *Morris v. Banking Co.*, 109 Ga. 12; 46 L. R. A. 506; 34 S. E. 378.

⁴⁹ *National Citizens' Bank v. Ertz*, 83 Minn. 12; 85 Am. St. Rep. 438; 53 L. R. A. 174; 85 N. W. 821.

⁵⁰ *First National Bank v. Buchan*, 79 Minn. 322; 82 N. W. 641.

⁵¹ *Dresser v. Construction Co.*, 93 U. S. 92; *Hubbard v. Chapin*, 2 All. (Mass.) 328; *Benson v. Keller*, 37 Or. 120; 60 Pac. 918.

⁵² *Chemical National Bank v. Wagner*, 93 Ky. 525; 40 Am. St. Rep. 206; 20 S. W. 535.

⁵³ *The Floyd Acceptances*, 7 Wall. (U. S.) 666.

⁵⁴ *People v. Bank*, 75 N. Y. 547.

⁵⁵ *Third National Bank v. Lange*, 51 Md. 138; 34 Am. Rep. 304; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; (a stock certificate).

⁵⁶ *Strong v. Strauss*, 40 O. S. 87.

⁵⁷ *Tradesmen's National Bank v. Looney*, 99 Tenn. 278; 63 Am. St. Rep. 830; 38 L. R. A. 837; 42 S. W. 149.

⁵⁸ *Yates v. Spofford*, 7 Ida. 737; 97 Am. St. Rep. 267; 65 Pac. 501.

⁵⁹ *Fletcher v. Schaumburg*, 41 Mo.

of payment.⁶⁰ The maker may estop himself from claiming notice, by expressly promising to pay the transferee, thereby inducing him to accept the note.⁶¹

§1302. Delivery or indorsement.

A holder, to be a *bona fide* holder, must take in accordance with the nature of the instrument. If it is payable to the payee or bearer, delivery alone is sufficient.¹ If it is payable to payee or order, the payee must indorse the instrument; that is, he must write his name upon the back of it, as well as deliver it to the holder, to constitute the latter a *bona fide* holder.² If a note is assigned but not delivered as where it is not the assignor's possession,³ the assignee takes subject to all defenses. If a note payable to "order" is assigned and delivered but not indorsed, the assignee takes subject to all defenses,⁴ although he takes the interest of his assignor.⁵ Thus if A transfers a note to B without indorsement, B taking without notice of defenses, and subsequently after B has notice of defenses A in-

501; (on the ground that "sheriff" was merely a *descriptio personæ*).

⁶⁰ Allen v. Johnson, 20 Ohio C. C. 8.

⁶¹ Sutton v. Beckwith, 68 Mich. 303; 13 Am. St. Rep. 344; 36 N. W. 79.

¹ Thompson v. Perrine, 106 U. S. 589; Truesdell v. Thompson, 12 Met. (Mass.) 565; Avery v. Latimer, 14 Ohio 542.

² Instone v. Williamson, 2 Bibb. (Ky.) 83; Bellis v. Lyons, 97 Mich. 398; 56 N. W. 770.

³ Muller v. Pondir, 55 N. Y. 325; 14 Am. Rep. 259.

⁴ Thompson-Houston Electric Co. v. Electric Co., 56 Fed. Rep. 849; Vann v. Marbury, 100 Ala. 438; 46 Am. St. Rep. 70; 23 L. R. A. 325; 14 So. 273; More v. Finger, 128 Cal. 313; 60 Pac. 933; Hays v. Plummer, 126 Cal. 107; 77 Am. St. Rep. 153; 58 Pac. 447; Benson v. Abbott,

95 Ga. 69; 22 S. E. 127; First National Bank v. Henry, 156 Ind. 1; 58 N. E. 1057; Marskey v. Turner, 81 Mich. 62; 45 N. W. 644; Helena National Bank v. Telephone Co., 20 Mont. 379; 63 Am. St. Rep. 628; 51 Pac. 829; Sackett v. Montgomery, 57 Neb. 424; 73 Am. St. Rep. 522; 77 N. W. 1083; Kyle v. Thompson, 11 O. S. 616; Goshen National Bank v. Bingham, 118 N. Y. 349; 16 Am. St. Rep. 765; 7 L. R. A. 595; 23 N. E. 180; Galusha v. Sherman, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495.

⁵ O'Keeffe v. Bank, 49 Kan. 347; 33 Am. St. Rep. 370; 30 Pac. 473; Stevens v. Hannan, 86 Mich. 305; 24 Am. St. Rep. 125; 48 N. W. 951; Sackett v. Montgomery, 57 Neb. 424; 73 Am. St. Rep. 522; 77 N. W. 1083; Hopkins v. Manchester, 16 R. I. 663; 7 L. R. A. 387; 19 Atl. 243.

dorses to B, B is not a *bona fide* holder.⁶ The owner's writing his name on a separate piece of paper,⁷ even if pinned to the note,⁸ is not indorsement, unless the back of the note is filled with indorsements and the additional paper is necessary for additional indorsements.

§1303. Taking for value.

The holder must take for value. If the holder does not give value for the note he is not a *bona fide* holder. Thus a receiver,¹ as the receiver of an insolvent bank,² or an assignee for the benefit of creditors,³ parts with nothing of value and is not a holder for value. He need not pay the full face of the instrument to be a holder for value,⁴ and the fact that he paid less than the face of the instrument, is material only if the discount is so great as to suggest that the *bona fide* holder knew of defenses to the instrument.⁵ The general rule is that a *bona fide* holder can recover the full amount of the instrument with interest, even if he has paid less than par therefor.⁶ Some authorities, however, limit the right of recovery of a *bona fide* holder of a note obtained through fraud, without consideration

⁶ Pavey v. Stauffer, 45 La. Ann. 353; 19 L. R. A. 716; 12 So. 512; Goshen National Bank v. Bingham, 118 N. Y. 349; 16 Am. St. Rep. 765; 7 L. R. A. 595; 23 N. E. 180.

⁷ Hays v. Plummer, 126 Cal. 107; 77 Am. St. Rep. 153; 58 Pac. 447; French v. Turner, 15 Ind. 59; Doll v. Hollenbeck, 19 Neb. 639.

⁸ Bishop v. Chase, 156 Mo. 158; 56 S. W. 1080.

¹ Litchfield Bank v. Peck, 29 Conn. 384.

² Colton v. Loan Association, 90 Md. 85; 78 Am. St. Rep. 431; 46 L. R. A. 388; 45 Atl. 23.

³ Roberts v. Hall, 37 Conn. 205; 9 Am. Rep. 308.

⁴ Goodman v. Simons, 20 How. (U. S.) 343; Wheeler v. Guild, 20 Pick. (Mass.) 545; 32 Am. Dec.

231; Kitchen v. Loudenback, 48 O. S. 177; 29 Am. St. Rep. 540; 26 N. E. 979; (\$367.50 paid for a note for \$450); Oppenheimer v. Bank, 97 Tenn. 19; 56 Am. St. Rep. 778; 33 L. R. A. 767; 36 S. W. 705. (Discount of twenty per cent.) McNamara v. Jose, 28 Wash. 461; 68 Pac. 903. (Discounted for one-half its face value.)

⁵ Williams v. Huntington, 68 Md. 590; 6 Am. St. Rep. 477; 13 Atl. 336; Wilson v. Denton, 82 Tex. 531; 27 Am. St. Rep. 908; 18 S. W. 620.

⁶ Wade v. Ry., 149 U. S. 327; Murphy v. Lucas, 58 Ind. 360; Oldham v. Turner, 3 B. Mon. (Ky.) 67; Kitchen v. Loudenback, 48 O. S. 177; 29 Am. St. Rep. 540; 26 N. E. 979.

to the amount paid by him therefor, with interest.⁷ If A buys a note from B and gives B his own note therefor, A is a holder for value of the note transferred by B, even if B was the agent of the real owner of the note without authority to sell, if A did not know this and if A's note is in the hands of a *bona fide* holder.⁸ If A gives credit on his account with B the transferrer of negotiable paper for such paper, A takes the same for value.⁹ It has been said that it is not the giving credit but honoring checks to the extent of such credit that makes the bank a holder for value,¹⁰ and that until such credit is checked out, A is not a holder for value.¹¹ Collateral security for a contemporaneous debt constitutes value.¹² Payment of a pre-existing debt constitutes "value."¹³ An indorsee for collateral

⁷ Richards v. Monroe, 85 Ia. 359; 39 Am. St. Rep. 301; 52 N. W. 339; (by statute); DeKay v. Water Co., 38 N. J. Eq. 158; Oppenheimer v. Bank, 97 Tenn. 19; 56 Am. St. Rep. 778; 33 L. R. A. 767; 36 S. W. 705; Green v. Stuart, 7 Baxt. (Tenn.) 422; Petty v. Hannum, 2 Humph. (Tenn.) 102; 36 Am. Dec. 303.

⁸ Wilson v. Denton, 82 Tex. 531; 27 Am. St. Rep. 908; 18 S. W. 620.

⁹ American Exchange Nat. Bk. v. Theummler, 195 Ill. 90; 88 Am. St. Rep. 177; 58 L. R. A. 51; 62 N. E. 932; Shaw v. Jacobs, 89 Ia. 713, 719; 48 Am. St. Rep. 411; 21 L. R. A. 440; 55 N. W. 333; 56 N. W. 684.

¹⁰ Dreilling v. Bank, 43 Kan. 197; 19 Am. St. Rep. 126; 23 Pac. 94.

¹¹ Dresser v. Construction Co., 93 U. S. 92; Morrison v. Bank, 9 Okla. 697; 60 Pac. 273; Dougherty v. Bank, 93 Pa. St. 227; 39 Am. Rep. 750.

¹² Bank v. Mfg. Co., 52 Fed. 98; 18 L. R. A. 201; Des Moines National Bank v. Chisholm, 71 Ia. 675; 33 N. W. 234; St. Paul Gaslight Co.

v. Sandstone, 73 Minn. 225; 75 N. W. 1050; Connecticut, etc., Co. v. Trumbo (Neb.), 90 N. W. 216; Connecticut, etc., Co. v. Fletcher, 61 Neb. 166; 85 N. W. 59; Noyes v. Landon, 59 Vt. 569; 10 Atl. 342; Bowman v. Van Keuren, 29 Wis. 209; 9 Am. Rep. 554.

¹³ Levy, etc., Co. v. Kauffman, 114 Fed. 170; 52 C. C. A. 126; Tabor v. Bank, 48 Ark. 454; 3 Am. St. Rep. 241; 3 S. W. 805; Lee v. Johnson, 110 Ga. 286; 34 S. E. 568; Foy v. Blackstone, 31 Ill. 538; 83 Am. Dec. 246; McKnight v. Knisely, 25 Ind. 336; 87 Am. Dec. 364; Frank v. Quast, 86 Ky. 649; 6 S. W. 909; Boston, etc., Co. v. Steuer, 183 Mass. 140; 97 Am. St. Rep. 426; 66 N. E. 646; Blanchard v. Stevens, 3 Cush. (Mass.) 162; 50 Am. Dec. 723; Carlisle v. Wishart, 11 Ohio 172; overruling Riley v. Johnson, 8 Ohio 526; Tradesmen's National Bank v. Looney, 99 Tenn. 278; 63 Am. St. Rep. 830; 38 L. R. A. 837; 42 S. W. 149; Herman v. Gunter, 83 Tex. 66; 29 Am. St. Rep. 632; 18 S. W. 428; Payne v. Zell, 98 Va. 294; 36 S. E. 379. *Contra*, Fer-

security is a *bona fide* holder only to the amount of his claim against his debtor. If a defense exists which can be interposed against any but a *bona fide* holder, he can recover only the amount of his claim,¹⁴ and if such debt is paid he ceases at once to be a *bona fide* holder,¹⁵ nor can the original holder claim any protection because the instrument has once been pledged as collateral.¹⁶ Whether collateral security for an antecedent debt constitutes "value" is a question on which authorities are in conflict, some courts holding that it is,¹⁷ others that it is not.¹⁸ If any right of value is surrendered by the party taking the collateral security,¹⁹ as where in consideration of such collateral

riss v. Tavel, 87 Tenn. 386; 3 L. R. A. 414; 11 S. W. 93.

¹⁴ St. Paul National Bank v. Cannon, 46 Minn. 95; 24 Am. St. Rep. 189; 48 N. W. 526; Crawford v. Spencer, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713.

¹⁵ First National Bank v. Mann, 94 Tenn. 17; 27 Am. St. Rep. 565; 27 L. R. A. 565; 27 S. W. 1015.

¹⁶ Booher v. Allen, 153 Mo. 613; 55 S. W. 238.

¹⁷ Swift v. Tyson, 16 Pet. (U. S.) 1. (A case arising in New York, in which the United States supreme court refused to follow the New York rule.) Hamilton v. Fowler, 99 Fed. 18; 40 C. C. A. 47; Sackett v. Johnson, 54 Cal. 107; Joliet, etc., Bank v. Adam, 138 Ill. 483; 28 N. E. 955; National Bank v. Dakin, 54 Kan. 656; 45 Am. St. Rep. 299; 39 Pac. 180; Fisher v. Fisher, 98 Mass. 303; Rosemond v. Graham, 54 Minn. 323; 40 Am. St. Rep. 336; 56 N. W. 38; Yellowstone National Bank v. Gagnon, 19 Mont. 402; 61 Am. St. Rep. 520; 44 L. R. A. 243; 48 Pac. 762; First National Bank v. Stockell, 92 Tenn. 252; 20 L. R. A. 605; 21 S. W. 523; Mercantile Bank v. Boggs, 48 W. Va. 289; 37 S. E. 587.

¹⁸ Cable v. Buchanan, 109 Ia. 661; 80 N. W. 1066; Galbraith v. McLaughlin, 91 Ia. 399; 59 N. W. 338; May v. Quimby, 3 Bush. (Ky.) 96; Smith v. Bibber, 82 Me. 34; 17 Am. St. Rep. 464; 19 Atl. 89; First National Bank v. Strauss, 66 Miss. 479; 14 Am. St. Rep. 579; 6 So. 232; Maynard v. Davis, 127 Mich. 571; 86 N. W. 1051; Loewen v. Forsee, 137 Mo. 29; 59 Am. St. Rep. 489; 38 S. W. 712; United States National Bank v. Ewing, 121 N. Y. 506; 27 Am. St. Rep. 615; 30 N. E. 501; Coddington v. Bay, 20 Johns. (N. Y.) 637; 11 Am. Dec. 342. (The leading case on this point.) Brooks v. Sullivan, 129 N. C. 190; 39 S. E. 822; Porter v. Andrus, 10 N. D. 558; 88 N. W. 567; Cleveland v. Bank, 16 O. S. 236; 88 Am. Dec. 445; Renzor v. Hatch, 7 O. S. 248 (obiter, as the note was held valid as between the original parties); Roxborough v. Messick, 6 O. S. 448; 67 Am. Dec. 346; Altoona, etc., Bank v. Dunn, 151 Pa. St. 228; 31 Am. St. Rep. 742; 25 Atl. 80; Bank v. Johnston, 105 Tenn. 521; 59 S. W. 131.

¹⁹ Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318; Ruddick v. Lloyd, 15 Ia. 441; 83 Am. Dec. 423; Amer-

he agrees upon an extension of time,²⁰ or surrenders other collateral,²¹ or surrenders other collateral and gives an extension of time,²² he is a holder for value.

§1304. Taking before maturity.

A holder, to be a *bona fide* holder, must take the instrument before maturity. If he takes after maturity he gets no better title than that of his indorser as against defenses which the maker may interpose, and which arise out of the instrument itself.¹ A note indorsed over on the second day of grace is indorsed before maturity.² An extension of time indorsed on a note prolongs maturity.³ For the purpose of determining the rights of the holder, a check is not overdue until a reasonable time has elapsed. Thus five days,⁴ six days,⁵ or ten days,⁶ have been held not unreasonable intervals. A demand note is overdue after a reasonable time has elapsed, as a year and a half.⁷ A certificate of deposit payable when returned is not overdue until it is returned.⁸ There is a conflict of authority as to

ican Exchange National Bank v. N. Y. Packing Co., 148 N. Y. 698; 43 N. E. 168.

²⁰ Louisville Banking Co. v. Howard, 123 Ala. 380; 82 Am. St. Rep. 126; 26 So. 207; Crawford v. Spencer, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713; First National Bank v. Fowler, 36 O. S. 524; 38 Am. Rep. 610.

²¹ American Exchange National Bank v. Packing Co., 148 N. Y. 698; 43 N. E. 168.

²² Kingsland v. Pryor, 33 O. S. 19.

¹ Morgan v. United States, 113 U. S. 476; Marshall v. Shiff, 130 Ala. 545; 30 So. 335; Risley v. Gray, 98 Cal. 40; 32 Pac. 884; Harrell v. Banking Co., 111 Ga. 846; 36 S. E. 460; Freittenburg v. Rubel, — Ia. —; 98 N. W. 624; State Trust Co. v. Turner, 111 Ia. 664; 53 L. R. A. 136; 82 N. W. 1029; Loewen v. Forsee, 137 Mo. 29; 59 Am. St. Rep.

489; 38 S. W. 712; First National Bank v. Bank, 34 Neb. 71; 33 Am. St. Rep. 618; 15 L. R. A. 386; 51 N. W. 305; Koehler v. Dodge, 31 Neb. 328; 28 Am. St. Rep. 518; 47 N. W. 913.

² Haug v. Riley, 101 Ga. 372; 40 L. R. A. 244; 29 S. E. 44.

³ Whitney National Bank v. Cannon, 52 La. Ann. 1484; 27 So. 948.

⁴ Fealey v. Bull, 163 N. Y. 397; 57 N. E. 631.

⁵ Rothschild v. Corney, 9 Barn. & C. 388; Estes v. Shoe Co., 59 Minn. 504; 50 Am. St. Rep. 424; 61 N. W. 674. (Especially if the parties are a considerable distance apart.)

⁶ Ames v. Meriam, 98 Mass. 294.

⁷ Guckian v. Newbold, 23 R. I. 553, 594; 51 Atl. 210.

⁸ Tobin v. McKinney, 15 S. D. 257; 88 N. W. 572; affirming, 14 S. D. 52; 84 N. W. 228.

whether one who takes after maturity takes subject to collateral defenses, such as set-off and counterclaim. Some courts holding that such defenses cannot be interposed,⁹ and others that it can.¹⁰ But even where set-off cannot ordinarily be asserted against a transferee after maturity, such set-off may be asserted against a transferee where the note is assigned fraudulently to defeat the set-off.¹¹

§1305. Presumption as to bona fides of holder.

One who is in possession of a negotiable instrument which has been delivered to him if payable to bearer or which has been indorsed to him, or which is indorsed generally, is presumed to be a *bona fide* holder thereof for value, without notice, and before maturity.¹ If, however, defenses are shown which could have been interposed against the original payee and the holder of the instrument is seeking to avoid the force of such defense by invoking his standing as *bona fide* holder, it is held that he is bound to show affirmatively that he took for value without notice and before maturity, by a transfer which passed the legal title. Thus if the contract is voidable by reason of fraud, the holder must show that he is a *bona fide* holder.² He must

⁹ Way v. Lamb, 15 Ia. 79; Cutler v. Cook, 77 Mo. 388; Chander v. Drew, 6 N. H. 469; 26 Am. Dec. 704; Haley v. Congdon, 56 Vt. 65.

¹⁰ Favorite v. Lord, 35 Ill. 142; Sargent v. Southgate, 5 Pick. (Mass.) 312; 16 Am. Dec. 409; Galliher v. Galliher, 10 Lea (Tenn.) 23.

¹¹ Davis v. Noll, 38 W. Va. 66; 45 Am. St. Rep. 841; 17 S. E. 791.

¹ Pana v. Bowler, 107 U. S. 529; Goodman v. Simonds, 20 How. (U. S.) 343; Yates v. Spofford, 7 Ida. 737; 97 Am. St. Rep. 267; 65 Pac. 501; Cook v. Norwood, 106 Ill. 558; Benton County Savings Bank v. Boddicker, 105 Ia. 548; 67 Am. St. Rep. 310; 45 L. R. A. 321; 75 N. W. 632; Clark v. Skeen, 61 Kan.

526; 78 Am. St. Rep. 337; 49 L. R. A. 190; 60 Pac. 327; Alexander v. Bank, 2 Met. (Ky.) 534; Pettee v. Prout, 3 Gray (Mass.) 502; 63 Am. Dec. 778; Vastine v. Wilding, 45 Mo. 89; 100 Am. Dec. 347; Rossiter v. Loeber, 18 Mont. 372; 45 Pac. 560; Manhattan Savings Institution v. Bank, 170 N. Y. 58; 88 Am. St. Rep. 640; 62 N. E. 1079; Davis v. Bartlett, 12 O. S. 534; 80 Am. Dec. 375; Third National Bank v. Angell, 18 R. I. 1; 29 Atl. 500; Voorhees v. Fisher, 9 Utah 303; 34 Pac. 64.

² Brook v. Teague, 52 Kan. 119; 34 Pac. 347; Carrier v. Cameron, 31 Mich. 373; 18 Am. Rep. 192; The Famous Shoe Co. v. Crosswhite, 124 Mo. 34; 46 Am. St. Rep. 424;

show that he paid value for the instrument,³ and that he did not know of the defenses interposed.⁴ Similar principles apply where it is shown that the note was originally obtained by duress.⁵ So if the instrument is shown to have been given without consideration and fraudulently transferred by the payee,⁶ or on an illegal consideration,⁷ the burden is on the holder. It has been held that if the holder shows that he gave value for the instrument and took it before maturity, it will be presumed that he had no notice of defenses.⁸ The weight of authority seems to be that if the defect in the instrument is merely want of consideration or failure of consideration without any element of fraud, the burden is not on the holder to show that he is a *bona fide* holder,⁹ though there is authority even in this case for holding that the burden is on the holder.¹⁰

26 L. R. A. 568; 27 S. W. 397; 590; 6 Am. St. Rep. 477; 13 Atl. Thamling v. Duffey, 14 Mont. 567; 336.
43 Am. St. Rep. 658; 37 Pac. 363;
Vosburgh v. Diefendorf, 119 N. Y. 357; 16 Am. St. Rep. 836; 23 N. E. 801.

³ Vosburgh v. Diefendorf, 119 N. Y. 357; 16 Am. St. Rep. 836; 23 N. E. 801.

⁴ Carrier v. Cameron, 31 Mich. 373; 18 Am. Rep. 192; Vosburgh v. Diefendorf, 119 N. Y. 357; 16 Am. St. Rep. 836; 23 N. E. 801.

⁵ French v. Paving Co., 100 Mich. 443; 59 N. W. 166.

⁶ Williams v. Huntington, 68 Md.

590; 6 Am. St. Rep. 477; 13 Atl. 336.

⁷ Emerson v. Burns, 114 Mass. 348.

⁸ Market, etc., Bank v. Sargent, 85 Me. 349; 35 Am. St. Rep. 376; 27 Atl. 192; Henry v. Sneed, 99 Mo. 407; 17 Am. St. Rep. 580; 12 S. W. 663.

⁹ Yates v. Spofford, 7 Ida. 737; 97 Am. St. Rep. 267; 65 Pac. 501; Shirk v. Mitchell, 137 Ind. 185; 36 N. E. 850; Little v. Mills, 98 Mich. 423; 57 N. W. 266; Kelman v. Calhoun, 43 Neb. 157; 61 N. W. 615.

¹⁰ Blaney v. Pelton, 60 Vt. 275; 13 Atl. 564.

CHAPTER LX.

CONTRACTS FOR BENEFIT OF THIRD PERSON.

§1306. Contracts for benefit of third person.—English rule.

If A makes a promise to B to do some act which will benefit C, can C enforce this promise against A?

The early English cases held that if the promise was supported by a valuable consideration, if it was a promise not under seal, and if it was intended primarily to benefit C, C could enforce such promise against A, at least if C was a near relation of B's.¹ The later English authorities have held that under no circumstances can C enforce a contract to which he is not a party.²

§1307. Majority American rule.

American courts are divided upon this question. The earlier American cases followed the early English rule and allowed recovery if C was closely related to B.¹ The weight of modern authority holds that C may recover from A if the promise is upon consideration, is not under seal, and is made primarily for C's benefit.² The doctrine that C can sue has led to many

¹ *Dutton v. Poole*, 1 Vent. 318; affirmed, T. Raym. 302.

² *Price v. Easton*, 4 B. & Ad. 433.

¹ *Felton v. Dickinson*, 10 Mass. 287.

² *Hendrick v. Lindsay*, 93 U. S. 143; *Buckley v. Gray*, 110 Cal. 339; 52 Am. St. Rep. 88; 31 L. R. A. 862; 42 Pac. 900; *Wright v. Terry*, 23 Fla. 160; 2 So. 6; *Lawrence v. Oglesby*, 178 Ill. 122; 52 N. E. 945; *Warder, etc., Co. v. Cummins*, 74 Ill. App. 650; *Ransdel v. Moore*,

153 Ind. 393; 53 L. R. A. 753; 53 N. E. 767; *Warren v. Farmer*, 100 Ind. 593; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Tinkler v. Swaynie*, 71 Ind. 562; *Howell v. Hough*, 46 Kan. 152; 26 Pac. 436; *Clay v. Woodrum*, 45 Kan. 116; 25 Pac. 619; *West v. Telegraph Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; 17 Pac. 807; *Holderman v. Tedford*, 7 Kan. App. 657; 53 Pac. 887; *Schmidtz v. Ry.*, 101 Ky. 441; 38 L. R. A. 809; 41 S. W. 1015; *Dan-*

practical difficulties, and while recognized and well established can hardly be said to be favored. Even the courts that allow C to sue, show "no disposition to extend the doctrine relating to third parties to new and doubtful cases."³

§1308. General principles of contract affecting this type.

Principles of the law of ordinary contracts often find a special and peculiar application in contracts of this type. There must be an agreement of some sort between A and B, whereby A is to do some act for the benefit of C. B leased realty from A, a railway under a contract whereby B released A from all liability for damage by fire. C, not knowing of such provision stored cotton on B's platform, on such realty, where it was destroyed by fire caused by A's negligence. The provision in B's lease was held to be no defense to A in an action brought by C.¹

- iels v. Gibson* (Ky.), 47 S. W. 621; *Benge v. Hiatt*, 82 Ky. 666; 56 Am. Rep. 912; *Sargeant v. Daunoy*, 14 La. 43; 33 Am. Dec. 573; *Coffin v. Bradbury*, 89 Me. 476; 36 Atl. 988; *Dearborn v. Parks*, 5 Greenl. (Me.) 81; 17 Am. Dec. 206; *Dickinson County v. Fitterling*, 72 Minn. 483; 75 N. W. 731; *Maxcy v. Ins. Co.*, 54 Minn. 272; 40 Am. St. Rep. 325; 55 N. W. 1130; *Howsmon v. Water Co.*, 119 Mo. 304; 41 Am. St. Rep. 654; 23 L. R. A. 146; 24 S. W. 784; *Ellis v. Harrison*, 104 Mo. 270; 16 S. W. 198; *State v. Gas Co.*, 102 Mo. 472; 22 Am. St. Rep. 789; 14 S. W. 974; 15 S. W. 383; *Rohman v. Gaiser*, 53 Neb. 474; 73 N. W. 923; *Kaufman v. Bank*, 31 Neb. 661; 48 N. W. 738; *Painter v. Kaiser*, — Nev. —; 76 Pac. 747; *Whitehead v. Burgess*, 61 N. J. L. 75; 38 Atl. 802; *Buchanan v. Tilden*, 158 N. Y. 109; 70 Am. St. Rep. 454; 44 L. R. A. 170; 52 N. E. 724; *Embler v. Ins. Co.*, 158 N. Y. 431; 44 L. R. A. 512; 53 N. E. 212; *Societa Italiana v. Sulzer*, 138 N. Y. 468; 34 N. E. 193; *Barker v. Bradley*, 42 N. Y. 316; 1 Am. Rep. 521; *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327; *Lawrence v. Fox*, 20 N. Y. 268; *Poe v. Dixon*, 60 O. S. 124; 71 Am. St. Rep. 713; 54 N. E. 86; *Society of Friends v. Haines*, 47 O. S. 423; 25 N. E. 119; *Thompson v. Thompson*, 4 O. S. 333; *Merriman v. Moore*, 90 Pa. St. 78; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195; 26 Am. Dec. 262; *Brown v. Markland*, 16 Utah 360; 67 Am. St. Rep. 629; 52 Pac. 597; *Thompson v. Cheesman*, 15 Utah 43; 48 Pac. 477; *Tweeddale v. Tweeddale*, 116 Wis. 517; 96 Am. St. Rep. 1003; 61 L. R. A. 509; 93 N. W. 440; *Stites v. Thompson*, 98 Wis. 329; 73 N. W. 774; *Larson v. Cook*, 85 Wis. 564; 55 N. W. 703.
- ³ *Montgomery v. Rief*, 15 Utah 495; 50 Pac. 623.
- ¹ *Texas, etc., Ry. v. Watson*, 190 U. S. 287; affirming, 112 Fed. 402; 50 C. C. A. 230.

The fact that B expects that A will do some act for the benefit of C does not impose any liability on A unless he has in some manner agreed to assume such liability.² Thus B transferred his property to a corporation A, and took stock therein, intending that his debts should be paid out of such property; but there was no agreement to that effect between A and B. B's creditors were not allowed to enforce payment of their debts from A.³ In jurisdictions in which the right of a third person to enforce a contract made for his benefit is not regarded with favor, it is held that a third person cannot enforce a contract for his benefit unless he is specifically named.⁴ In other jurisdictions which regard this right with greater favor, it is held that one who is indicated in a sufficiently definite way may enforce a contract intended for his benefit though he is not specifically named.⁵ Since an offer may ordinarily be made to a person to be ascertained in the future,⁶ a promise by A to B for the benefit of a third person is not invalid because such third person is not ascertained when the promise is made.⁷ Thus where A, the owner of a stallion, agreed with B, the owner of a mare, that A would pay to any person who should own the first of the foals of such mare by such stallion, which should trot a mile in two minutes and thirty seconds or less, the sum of seven hundred fifty dollars, and C bought one of the foals, knowing of such promise, it was held that if the foal owned by C trotted a mile in the prescribed time, C would recover from A.⁸

As in the cases of all other contracts it is necessary that the third person should accept the offer made for his benefit to en-

² *Durlacher v. Frazer*, 8 Wyom. 58; 80 Am. St. Rep. 918; 55 Pac. 306.

³ *Durlacher v. Frazer*, 8 Wyom. 58; 80 Am. St. Rep. 918; 55 Pac. 306.

⁴ *Harvey v. Milk Co.*, 92 Me. 115; 42 Atl. 342; *Carr v. Bank*, 107 Mass. 45; 9 Am. Rep. 6; *Dow v. Clark*, 7 Gray (Mass.) 198.

⁵ *State v. Gaslight Co.*, 102 Mo.

472; 22 Am. St. Rep. 789; 14 S. W. 974; 15 S. W. 383.

⁶ See § 51.

⁷ *Whitehead v. Burgess*, 61 N. J. L. 75; 38 Atl. 802. (The court expressly treated this as analogous to contracts offering rewards to persons not then known.)

⁸ *Whitehead v. Burgess*, 61 N. J. L. 75; 38 Atl. 802.

able him to enforce it. His bringing an action on the contract is a sufficient acceptance thereof.⁹ No formal assent before the bringing of the action is necessary.¹⁰ The third person may accept even though he is then an infant.¹¹ A agreed with B to convey certain realty to C, B's child, on consideration that A might name C. It was held that C's bearing such name down to the time of the suit is such an acceptance that C may sue A on such promise.¹² The characteristic feature of contracts of this class is that the third person benefited by the contract is not a party to it. Accordingly if the contract is in writing, the fact that it is not delivered to C does not prevent him from enforcing it.¹³ If C accepts the benefits of such promise he must assume all the conditions and liabilities that the parties have attached thereto.¹⁴

The promisor and the promisee may rescind the contract without the consent of the third person at any time before he has assented to it or acted on it.¹⁵ If the promisor agrees to pay something to a third person to whom the promisee is not indebted such third person cannot enforce this promise after the promisor has settled all his liability by a payment to the promisee.¹⁶ It can be rescinded so as to bar the rights of the third person, only "before it is brought to his knowledge and he has assented to it and acted on it."¹⁷ After the third person has

⁹ North Alabama Development Co. v. Orman, 55 Fed. 18; 5 C. C. A. 22; Coppage v. Gregg, 127 Ind. 359; 26 N. E. 903; McCoy v. McCoy, — Ind. App. —; 69 N. E. 193; Stariha v. Greenwood, 28 Minn. 521; 11 N. W. 76; Campbell v. Smith, 71 N. Y. 26; 27 Am. Rep. 5.

¹⁰ Tweeddale v. Tweeddale, 116 Wis. 517; 96 Am. St. Rep. 1003; 61 L. R. A. 509; 93 N. W. 440.

¹¹ Gooden v. Rayl, 85 Ia. 592; 52 N. W. 506; Strong v. Marcy, 33 Kan. 109; 5 Pac. 366; Bengé v. Hiatt, 82 Ky. 666; 56 Am. Rep. 912; McCarty v. Blevens, 5 Yerg. (Tenn.) 195; 26 Am. Dec. 262.

¹² Daily v. Minnick, 117 Ia. 563;

60 L. R. A. 840; 91 N. W. 913.

¹³ Copeland v. Summers, 138 Ind. 219; 35 N. E. 514; 37 N. E. 971; Stevens v. Flannagan, 131 Ind. 122; 30 N. E. 898.

¹⁴ Schneider v. Ins. Co., 123 N. Y. 109; 20 Am. St. Rep. 727; 25 N. E. 321.

¹⁵ Commercial National Bank v. Kirkwood, 172 Ill. 563; 50 N. E. 219; Davis v. Calloway, 30 Ind. 112; 95 Am. Dec. 671; Brewer v. Maurer, 38 O. S. 543; 43 Am. Rep. 436; Trimble v. Strother, 25 O. S. 378.

¹⁶ Townsend v. Rackham, 143 N. Y. 516; 38 N. E. 731.

¹⁷ Gifford v. Corrigan, 117 N. Y.

accepted this offer, it seems that the promisor and promisee cannot rescind.¹⁸ Thus where A, a grantee, assumed and agreed to pay a mortgage from his grantor B, to C; and C has notified A that he holds him liable, and C has brought suit against A, but summons has not yet been served, A can not avoid liability by taking a release from B.¹⁹

If C can maintain an action upon A's promise, any defense which A could invoke as against B can be invoked against C.²⁰ Thus failure of consideration caused by B's default may be invoked as against C.²¹ A's liability to C is measured by his contract with B. If A has promised to pay B's debts up to a certain amount, and the total amount of B's debts is uncertain, C, one of B's creditors may sue A, but A may compel the action to be brought for the benefit of all the creditors so that the adjudication rendered will bind all and free A from further liability.²² If A has paid the entire amount of his contract liability to one of the creditors, he may be compelled to pay to the other creditors such sum as they would have received if they had all been made parties and had received proportionate amounts of the sum paid by A.²³

§1309. Consideration in contracts of this type.

Consideration is as essential in contracts of this type as in others,¹ and as in others it may be either a benefit to the promisor or a detriment to the promisee. Carrying this principle

257, 265; 15 Am. St. Rep. 508; 6 L. R. A. 610; 22 N. E. 756.

¹⁸ Bay v. Williams, 112 Ill. 91; 54 Am. Rep. 209; Gilbert v. Sander-son, 56 Ia. 349; 41 Am. Rep. 103; 2 N. W. 293; Gold v. Ogden, 61 Minn. 88; 63 N. W. 266; Gifford v. Corrigan, 117 N. Y. 257; 15 Am. St. Rep. 508; 6 L. R. A. 610; 22 N. E. 756. *Contra*, that the promisor and promisee can rescind without reference to any rights of third parties. Biddell v. Brizzolara, 64 Cal. 354; 30 Pac. 609; Laing v. Byrne, 34 N. J. Eq. 52.

¹⁹ Gifford v. Corrigan, 117 N. Y. 257; 15 Am. St. Rep. 508; 6 L. R. A. 610; 22 N. E. 756.

²⁰ Ellis v. Harrison, 104 Mo. 270; 16 S. W. 198; Dunning v. Leavitt, 85 N. Y. 30; 39 Am. Rep. 617.

²¹ Clay v. Woodrum, 45 Kan. 116; 25 Pac. 619; Osborne v. Cabell, 77 Va. 462.

²² Bell v. Mendenhall, 71 Minn. 331; 73 N. W. 1086.

²³ Curry v. Homer, 62 O. S. 233; 56 N. E. 870.

¹ McArthur v. Dryden, 6 N. D. 438; 71 N. W. 125.

farther and applying it to contracts of this type, *C* is, in many jurisdictions, allowed to sue even though the consideration for *A*'s promise does not move from *C* in whole or in part.²

§1310. Promisor cannot deny validity of obligation.

The grantee cannot deny the validity of a specific existing debt which he has assumed and agreed to pay as part of the purchase price of the property conveyed to him.¹ Thus he cannot set up usury as a defense,² nor want of consideration as between the promisee and the third person,³ except in jurisdictions where the promisor is liable only if the promisee was personally liable.⁴

§1311. From whom consideration must move.

A question on which there is conflict of authority in the jurisdictions which recognize the right of a third party to sue on a contract for his benefit, is whether it is necessary that the promisee be under some legal or equitable obligation to the third

² *Cobb v. Heron*, 180 Ill. 49; 54 N. E. 189; *Ferris v. Brewing Co.*, 155 Ind. 539; 52 L. R. A. 305; 58 N. E. 701; *Ransdel v. Moore*, 153 Ind. 393; 53 L. R. A. 753; 53 N. E. 767; *Copeland v. Summers*, 138 Ind. 219; 35 N. E. 514; 37 N. E. 971; *Munday v. Munday* (Ky.), 52 S. W. 366; *Glencoe, etc., Co. v. Wind*, 86 Mo. App. 163; *Rohman v. Gaiser*, 53 Neb. 474; 73 N. W. 923; *Morrill v. Skinner*, 57 Neb. 164; 77 N. W. 375; *Meyer v. Shamp*, 51 Neb. 424; 71 N. W. 57; *Hare v. Murphy*, 45 Neb. 809; 29 L. R. A. 851; 60 N. W. 211; *Kaufman v. Bank*, 31 Neb. 661; 48 N. W. 738; *Whitehead v. Burgess*, 61 N. J. L. 75; 38 Atl. 802; *Buchanan v. Tilden*, 158 N. Y. 109; 70 Am. St. Rep. 454; 44 L. R. A. 170; 52 N. E. 724; *Brewer v. Maurer*, 38 O. S. 543; 43 Am. Rep. 436; *Merriman v.*

Moore, 90 Pa. St. 78; *Brown v. Markland*, 16 Utah 360; 67 Am. St. Rep. 629; 52 Pac. 597; *Montgomery v. Rief*, 15 Utah 495; 50 Pac. 623; *McKay v. Ward*, 20 Utah 149; 46 L. R. A. 623; 57 Pac. 1024; *Enos v. Sanger*, 96 Wis. 150; 65 Am. St. Rep. 38; 37 L. R. A. 862; 70 N. W. 1069; *Grant v. Lock Co.*, 77 Wis. 72; 45 N. W. 951.

¹ *Washer v. Development Co.*, 142 Cal. 702; 76 Pac. 654; *Harts v. Emery*, 184 Ill. 560; 56 N. E. 865; *Green v. Houston*, 22 Kan. 35; *Crawford v. Edwards*, 33 Mich. 354; *Alt v. Banholzer*, 36 Minn. 57; 29 N. W. 674.

² *Scanlan v. Grimmer*, 71 Minn. 351; 70 Am. St. Rep. 326; 74 N. W. 146.

³ *Parkinson v. Sherman*, 74 N. Y. 88; 30 Am. Rep. 268.

⁴ See § 311.

person for whose benefit the contract is made. In some jurisdictions it is said that the third person can enforce the contract only when one of the parties to the contract,¹ as the promisee,² is under either a legal or equitable obligation to such third person, for the purpose of discharging which obligation the promise is made. Thus where a lessee was making improvements and the contractor gave bond to the lessee for the use of the owner and all persons who may do work on such improvements, conditioned to be void if all just claims were paid, it was held that as the lessee could not be affected by mechanics' liens he had no legal interest in the payment of the claims of material men, and hence material men could not sue on such bond.³ So if a grantee assumes and agrees to pay a lien on the realty conveyed as part of the purchase price, the courts in which this doctrine obtains hold that such grantee is not liable on this covenant to the mortgagee unless the grantor was personally liable to the debts secured by the lien. If the debt is one for which the grantor is not personally liable, the grantee is not personally liable on such covenant.⁴ So where A had, in consideration of a conveyance from X, assumed and agreed to pay B's note to C, given for love and affection, he was held not liable to C.⁵ Un-

¹ Chicago, etc., Ry. v. Ottumwa, 112 Ia. 300; 51 L. R. A. 763; 83 N. W. 1074; McDonald v. Bank, 25 Mont. 456; 65 Pac. 896; Edmundson v. Penny, 1 Pa. St. 324; 44 Am. Dec. 137.

² Morris v. Mix, 4 Kan. App. 654; 46 Pac. 58; Union Railway Storage Co. v. McDermott, 53 Minn. 407; 55 N. W. 606; Jefferson v. Asch, 53 Minn. 446; 39 Am. St. Rep. 618; 25 L. R. A. 257; 55 N. W. 604; Norwood v. De Hart, 30 N. J. Eq. 412; Embler v. Ins. Co., 158 N. Y. 431; 44 L. R. A. 512; 53 N. E. 212; Vrooman v. Turner, 69 N. Y. 280; 25 Am. Rep. 195; Trotter v. Hughes, 12 N. Y. 74; 62 Am. Dec. 137; Osborne v. Cabell, 77 Va. 462.

³ Jefferson v. Asch, 53 Minn. 446;

39 Am. St. Rep. 618; 25 L. R. A. 257; 55 N. W. 604.

⁴ Ward v. De Oca, 120 Cal. 102; 52 Pac. 130; New England Trust Co. v. Nash, 5 Kan. App. 739; 46 Pac. 987; Vrooman v. Turner, 69 N. Y. 280; 25 Am. Rep. 195; Trotter v. Hughes, 12 N. Y. 74; 62 Am. Dec. 137.

⁵ Wilbur v. Wilbur, 17 R. I. 295; 21 Atl. 497. (B was the father of A and X. C was X's son. The court was urged to hold A liable, on the authority of Urquhart v. Brayton, 12 R. I. 169, and Wood v. Moriarty, 15 R. I. 518; 9 Atl. 427, saying: "We are not prepared to extend the authority of the cases mentioned to a case where no debt is assumed.")

der the Georgia statute if the consideration moves from B to A and A's promise is to B for the benefit of X, X cannot sue, but if the promise is directly to X, he can sue.⁶

Other authorities hold that if a sufficient consideration exists between the promisor and the promisee, the third person for whose benefit the contract is made may sue thereon whether either party to the contract was under any obligation to him or not.⁷ Where this last view is entertained a mortgagee can enforce the mortgage debt against the grantee personally, even if the grantor is not personally liable upon such debt.⁸

The same court has often entertained different views at different times with reference to the necessity of personal liability of the promisee to enable the third person to enforce the contract as against the promisor. Thus in Missouri the right of a mortgagee to sue a grantee who assumed the mortgage debt was at first recognized.⁹ This view was in effect though not in form overruled.¹⁰ In turn the views expressed in the last cases were overruled.¹¹ Then it was held that the third person could sue only when the promisee was under some legal or equitable obligation to him, which the promise was to discharge.¹² In turn this last case was overruled and such obligation was held unnecessary.¹³

⁶ *Hawkins v. Central of Georgia Ry.*, 119 Ga. 159; 46 S. E. 82.

⁷ *Bay v. Williams*, 112 Ill. 91; 54 Am. Rep. 209; 1 N. E. 340; *Dean v. Walker*, 107 Ill. 540; 47 Am. Rep. 467; *Marble Savings Bank v. Mesarvey*, 101 Ia. 285; 70 N. W. 198; *Crone v. Stinde*, 156 Mo. 262; 55 S. W. 863; 56 S. W. 907.

⁸ *Dean v. Walker*, 107 Ill. 540; 47 Am. Rep. 467; *Marble Savings Bank v. Mesarvey*, 101 Ia. 285; 70 N. W. 198; *Crone v. Stinde*, 156 Mo. 262; 55 S. W. 863; 56 S. W. 907; *Hare v. Murphy*, 45 Neb. 809; 29 L. R. A. 851; 64 N. W. 211.

⁹ *Heim v. Vogel*, 69 Mo. 529; *Rogers v. Gosnell*, 58 Mo. 589.

¹⁰ *Howsmon v. Water Co.*, 119

Mo. 304; 41 Am. St. Rep. 654; 23 L. R. A. 146; 24 S. W. 784; *Kansas City, etc., Co. v. Thompson*, 120 Mo. 218; 25 S. W. 522.

¹¹ *St. Louis v. Von Phul*, 133 Mo. 561; 54 Am. St. Rep. 695; 34 S. W. 843.

¹² *Hicks v. Hamilton*, 144 Mo. 495; 66 Am. St. Rep. 431; 46 S. W. 432.

¹³ "The consideration passing between the two contracting parties by which one of them promises to pay to a third is just as available as if he himself had paid the consideration." *Crone v. Stinde*, 156 Mo. 262, 269; 55 S. W. 863; 56 S. W. 907.

§1312. Intention necessary to benefit third person directly.

The courts in which C is allowed to enforce the promise against A do so only when A's promise is primarily intended to benefit C. If the benefit to C is merely incidental, C cannot maintain an action against A.¹ Some courts go further and hold that C can sue only when he is the sole beneficiary.² This

¹ *Constable v. Steamship Co.*, 154 U. S. 51; *National Bank v. Grand Lodge*, 98 U. S. 123; *American, etc., Bank v. Ry.*, 76 Fed. 130; *Sayward v. Dexter, etc., Co.*, 72 Fed. 758; 19 C. C. A. 176; *Austin v. Seligman*, 18 Fed. 519; *Thomas Mfg. Co. v. Prather*, 65 Ark. 27; 44 S. W. 218; *Chung Kee v. Davidson*, 73 Cal. 522; 15 Pac. 100; *Buckley v. Gray*, 110 Cal. 339; 52 Am. St. Rep. 88, 31 L. R. A. 862; 42 Pac. 900; *Treat v. Stanton*, 14 Conn. 445; 36 Am. Dec. 492; *Freeman v. Ry.*, 32 Fla. 420; 13 So. 892; *Wright v. Terry*, 23 Fla. 160; 2 So. 6; *Crandall v. Payne*, 154 Ill. 627; 39 N. E. 601; affirming, 54 Ill. App. 644; *Reynolds v. Ry.*, 143 Ind. 579; 40 N. E. 410; *Farlow v. Kemp*, 7 Blackf. (Ind.) 544; *German State Bank v. Northwestern, etc., Co.*, 104 Ia. 717; 74 N. W. 685; *Burton v. Larkin*, 36 Kan. 246; 59 Am. Rep. 541; 13 Pac. 398; *Gibson v. Johnson (Ky.)*, 65 S. W. 116; *Greenwood v. Sheldon*, 31 Minn. 254; 17 N. W. 473; *Erkerling v. Thomas*, 64 Neb. 193; 89 N. W. 1005; *Styles v. F. R. Long Co.*, 67 N. J. L. 413; 51 Atl. 710; affirmed in *Styles v. F. R. Long Co.*, — N. J. L. —; 57 Atl. 448; *Berry Harvester Co. v. Machine Co.*, 152 N. Y. 540; 46 N. E. 952; *Eaton v. Waterworks Co.*, 37 Neb. 546; 40 Am. St. Rep. 510; 21 L. R. A. 653; 56 N. W. 201; *Durnherr v. Rau*, 135 N. Y. 219; 32 N. E. 49; *Lorillard v. Clyde*, 122 N. Y. 498; 19

Am. St. Rep. 514; 10 L. R. A. 113; 25 N. E. 917; *Vrooman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195; *Simson v. Brown*, 68 N. Y. 355; *Parlin v. Hall*, 2 N. D. 473; 52 N. W. 405; *Vought v. R. R.*, 58 O. S. 123; 50 N. E. 442; *Brower, etc., Lumber Co. v. Miller*, 28 Or. 565; 52 Am. St. Rep. 807; 43 Pac. 659; *Washburn v. Investment Co.*, 26 Or. 436; 38 Pac. 620; 36 Pac. 533; *Parker v. Jeffery*, 26 Or. 186; 37 Pac. 712; *Blymire v. Boistle*, 6 Watts (Pa.) 182; 31 Am. Dec. 458; *Montgomery v. Rief*, 15 Utah 495; 50 Pac. 623; *Electric Appliance Co. v. Guaranty Co.*, 110 Wis. 434; 53 L. R. A. 609; 85 N. W. 648; *Campbell v. Carnagie*, 98 Wis. 99; 73 N. W. 572. "To entitle him to an action the contract must have been made for his benefit. He must be the party intended to be benefited." *Garnsey v. Rogers*, 47 N. Y. 233, 240; 7 Am. Rep. 440; quoted in *Montgomery v. Rief*, 15 Utah, 495, 501; 50 Pac. 623. The "benefit must be the direct result of performance." *Durnherr v. Rau*, 135 N. Y. 219; 32 N. E. 49.

² The rule allowing third persons to sue is "confined to cases where the person for whose benefit the promise is made has the sole exclusive interest in its performance." *German State Bank v. Light Co.*, 104 Ia. 717, 723; 74 N. W. 685; quoted in *Chicago, etc., Ry. v. Ottumwa*, 112 Ia. 300; 51 L. R. A. 763; 83 N. W. 1074; *Messenger v.*

principle has been otherwise expressed by saying that the third person may sue only when a release from him would discharge the promisor.³

§1313. Contracts conferring incidental benefit.

Among examples of contracts which may give incidental benefit to a third person, but which are not intended by the parties to benefit him primarily are the following: A contract whereby the prospective vendee of a mine seeks to have liens held by third persons cleared off before he takes title,¹ a promise by one to whom an administrator pays a fund, believing him to be a distributee, to repay a proportionate part of any lawful claim against the estate,² and a contract whereby the lessee of a railway agrees to pay all taxes and assessments.³ A contract between the United States and a state for the maintenance of a canal cannot be enforced by one who has made use of water furnished from such canal.⁴ A covenant by vendee with his vendor to repair a ditch which has become a substitute for a natural water-course cannot be enforced by a third person who is incidentally benefited thereby.⁵ A contract between an employer and an employee, whereby the employer agrees to furnish his employee a physician if the employee is injured in the course of his employment cannot be enforced by a physician whom the employee engages.⁶ If a mortgagor of cattle, with consent of mortgagee, employs a person to take care of such cattle, this does not impose any liability upon mortgagee to

Votaw, 75 Ia. 225; 39 N. W. 280; Davis v. Waterworks Co., 54 Ia. 59; 37 Am. Rep. 185; 6 N. W. 126.

³ Kountz v. Holthouse, 85 Pa. St. 235.

¹ McDonald v. Bank, 25 Mont. 456; 65 Pac. 896. (The lien holder cannot enforce such contract.)

² Norwood v. O'Neal, 112 N. C. 127; 16 S. E. 759. (The true distributee cannot enforce such promise.)

³ Chicago, etc., Ry. v. Ottumwa,

112 Ia. 300; 51 L. R. A. 763; 83 N. W. 1074. (Neither the city nor the contractor for whose benefit the assessment is levied can sue the lessee.)

⁴ Vought v. R. R., 58 O. S. 123; 50 N. E. 442; affirmed in Walsh v. R. R., 176 U. S. 469.

⁵ Case v. Hoffman, 100 Wis. 314; 44 L. R. A. 728; 75 N. W. 945.

⁶ Thomas Mfg. Co. v. Prather, 65 Ark. 27; 44 S. W. 218.

pay for such care.⁷ Employment of an attorney by a woman to draw her will creates no liability from such attorney to her son though by gross negligence the will is so drawn as to deprive her son of a provision intended for him.⁸ If A is employed by B to examine an abstract of title, A is not liable for his negligence to C even if he knows that B means to use such certificate to induce C to buy or make a loan.⁹ Some courts hold that A is here liable to C.¹⁰ If a waterworks company makes a contract with a city to supply a certain amount of water in a given time, to maintain a certain pressure, to keep the water at a certain height in the supply pipe and the like, and by reason of a breach of such covenant loss by fire occurs to the damage of a property owner, the weight of authority holds that he cannot maintain an action against the waterworks company for a breach of such covenant.¹¹ So an insurance company which has been obliged to pay an insurance policy on such building cannot maintain

⁷ *Boston, etc., Co. v. Dickson*, 11 Okla. 680; 69 Pac. 889.

⁸ *Buckley v. Gray*, 110 Cal. 339; 52 Am. St. Rep. 88; 31 L. R. A. 862; 42 Pac. 900.

⁹ *Ward v. Bank*, 100 U. S. 195; *Tapley v. Wright*, 61 Ark. 275; 54 Am. St. Rep. 206; 32 S. W. 1072; *Mallory v. Ferguson*, 50 Kan. 685; 22 L. R. A. 99; 32 Pac. 410; *Zweigardt v. Birdseye*, 57 Mo. App. 462.

¹⁰ *Gate City Abstract Co. v. Post*, 55 Neb. 742; 76 N. W. 471; *Economy, etc., Association v. Title Co.*, 64 N. J. L. 27; 44 Atl. 854; *Dickle v. Abstract Co.*, 89 Tenn. 431; 24 Am. St. Rep. 616; 14 S. W. 896.

¹¹ *Boston Safe Deposit and Trust Co. v. Water Co.*, 94 Fed. 238; *Nickerson v. Hydraulic Co.*, 46 Conn. 24; 33 Am. Rep. 1; *Fowler v. Waterworks Co.*, 83 Ga. 219; 20 Am. St. Rep. 313; 9 S. E. 673; *Bush v. Water Co.*, 4 Ida. 618; 95 Am. St. Rep. 161; 43 Pac. 69; *Fitch v. Water Co.*, 139 Ind. 214; 37 N. E.

982; 47 Am. St. Rep. 258; *Becker v. Waterworks*, 79 Ia. 419; 18 Am. St. Rep. 377; 44 N. W. 694; *Davis v. Waterworks Co.*, 54 Ia. 59; 37 Am. Rep. 185; 6 N. W. 126; *Mott v. Mfg. Co.*, 48 Kan. 12; 30 Am. St. Rep. 267; 15 L. R. A. 375; 28 Pac. 989; *Howsmon v. Water Co.*, 119 Mo. 304; 41 Am. St. Rep. 654; 23 L. R. A. 146; 24 S. W. 784; *Phoenix Ins. Co. v. Water Co.*, 42 Mo. App. 118; *Eaton v. Waterworks Co.*, 37 Neb. 546; 40 Am. St. Rep. 510; 21 L. R. A. 653; 56 N. W. 201; *Ferris v. Water Co.*, 16 Nev. 44; 40 Am. Rep. 485; *Akron Waterworks Co. v. Brownless*, 10 Ohio C. C. 620; 5 Ohio C. D. 1; *Beck v. Water Co. (Pa.)*, 11 Atl. 300; *Foster v. Waterworks Co.*, 3 Lea (Tenn.) 42; *House v. Waterworks Co.*, 88 Tex. 233; 28 L. R. A. 532; 31 S. W. 179; *Britton v. Waterworks Co.*, 81 Wis. 48; 29 Am. St. Rep. 856; 51 N. W. 84; *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760.

an action therefor against the waterworks company.¹² This conclusion leads to the further result that no action for such loss can be maintained by anyone, since it is clear that the city as such has not suffered by the loss of the property burned. Accordingly there is a vigorous, though limited, dissent from this doctrine, and some cases hold that the injured party may maintain an action against the waterworks company.¹³ B granted property to A upon which was a mortgage given by B, in which B's wife C had joined to release her dower. As part of the purchase price B agreed to pay all encumbrances "by mortgage or otherwise" upon the property conveyed. A did not pay such mortgage debt and the realty was sold on foreclosure proceedings, by which C's dower was lost. C sued A on his covenant for the loss of her dower. It was held that she could not maintain such action, as the covenant was not for her benefit.¹⁴ So a contract by a bank with a depositor, evidenced by a certificate of deposit, to pay the amount of the deposit to the depositor if drawn out during her life, and if not, to a designated third person, cannot be enforced by such third person,¹⁵ and a covenant by the licensee of a patent right to give the inventor opportunities to perfect his invention cannot be enforced by the licensor.¹⁶ A contract made by a carrier with a collector of customs as a condition of permission for the goods to remain at the wharf for forty-eight hours, whereby the carrier agrees to pay to the consignee the value of goods stolen, lost, or burned, cannot be enforced by a consignee who holds a bill of lading which provides that the goods shall be at the consignee's risk of fire.¹⁷ So where B, a shipper, had a contract with C, a rail-

¹² *Phoenix Ins. Co. v. Water Co.*, 42 Mo. App. 118.

¹³ *Paducah Lumber Co. v. Water Supply Co.*, 89 Ky. 340; 25 Am. St. Rep. 536; 7 L. R. A. 77; 12 S. W. 554; 13 S. W. 249; *Gorrell v. Water Supply Co.*, 124 N. C. 328; 70 Am. St. Rep. 598; 46 L. R. A. 513; 32 S. E. 720.

¹⁴ *Durnherr v. Rau*, 135 N. Y. 219; 32 N. E. 49. The "covenant was with the husband alone."

¹⁵ *Sullivan v. Sullivan*, 161 N. Y. 554; 56 N. E. 116. (Distinguishing *Buchanan v. Tilden*, 158 N. Y. 109; 70 Am. St. Rep. 454; 44 L. R. A. 170; 52 N. E. 724; *Dutton v. Pool*, 1 Vent. 318; *Tod v. Weber*, 95 N. Y. 181; 47 Am. St. Rep. 20.)

¹⁶ *Berry Harvester Co. v. Machine Co.*, 152 N. Y. 540; 46 N. E. 952.

¹⁷ *Constable v. Steamship Co.*, 154 U. S. 51.

road company, to receive and transport certain goods which A, a ship owner, had delivered at a designated wharf under charter with B, A cannot maintain an action against C for breach of C's contract with B whereby A's ship is detained.¹⁸ Where two railroads had entered into a contract whereby the first railroad was to have the use of the track of the second railroad, a shipper over the first railroad cannot maintain an action against the second railroad for breach of such contract.¹⁹ So where A and B agree to form a corporation, and agree that such corporation shall, when formed, "assume" a certain lease "at the present rental," the lessor and lessee under such lease not being parties to the contract, the lessor cannot enforce such contract against A.²⁰ An agreement between stockholders of a corporation and such corporation whereby the stockholders agree to raise a fund to discharge certain debts of the corporation, is not intended for the benefit of such creditors of the corporation and they cannot enforce such contract even in equity.²¹ So an agreement by A to lend money to B gives no right in equity to B's creditors to enforce such promise though B intended to use such money to pay such debts.²² So if a street railway company accepts an ordinance requiring it to pave between the tracks, this provision is not intended for the benefit of private citizens who may be benefited thereby incidentally, and they cannot sue to enforce such covenant.²³

§1314. Contracts intended to confer benefit.—Assumption of debts on consideration of conveyance.

In discussing the practical application of the foregoing principles to particular states of fact, we find that the most usual

¹⁸ *Freeman v. Ry.*, 32 Fla. 420; 13 So. 892.

¹⁹ *St. Louis, etc., Ry. v. Neel*, 56 Ark. 279; 19 S. W. 963.

²⁰ *Lorillard v. Clyde*, 122 N. Y. 498; 19 Am. St. Rep. 514; 10 L. R. A. 113; 25 N. E. 917.

²¹ *Pettibone v. R. R.*, 148 Mass. 411; 1 L. R. A. 787; 19 N. E. 337.

²² *Anglo-American, etc., Associa-*

tion v. Campbell, 13 App. D. C. 581; 43 L. R. A. 622. For a similar case see *Burton v. Larkin*, 36 Kan. 246; 59 Am. Rep. 541; 13 Pac. 398.

²³ *Fielders v. Ry.*, 68 N. J. L. 343; 96 Am. St. Rep. 552; 59 L. R. A. 455; 53 Atl. 404; 54 Atl. 822; reversing, 67 N. J. L. 76; 50 Atl. 533.

type of this contract exists where B has conveyed property to A and in consideration thereof A promises to B to discharge a debt due from B to C. If B conveys property or pays money to A, and in consideration thereof A promises to discharge a debt due from B to C, C can maintain an action against A.¹ One of the most common cases of this class exists where A, the grantee, assumes and agrees to pay a debt secured by a mortgage on the realty conveyed to him.² So if a mortgagee retains

¹ *Barker v. Car Co.*, 124 Fed. 555; *Blackmore v. Parkes*, 81 Fed. 899; 26 C. C. A. 670; *Aultman v. Fletcher*, 110 Ala. 452; 18 So. 215; *North Alabama Development Co. v. Short* (Ala.), 13 So. 385; *Washer v. Development Co.*, 142 Cal. 702; 76 Pac. 654; *Tevis v. Savage*, 130 Cal. 411; 62 Pac. 611; *Meyer v. Parsons*, 129 Cal. 653; 62 Pac. 216; *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360; 11 So. 488; *Smith v. Caldwell*, 6 Ida. 436; 55 Pac. 1065; *Commercial National Bank v. Kirkwood*, 172 Ill. 563; 50 N. E. 219; *reversing*, 68 Ill. App. 116; *Scudder v. Carter*, 43 Ill. App. 252; *Bateman v. Butler*, 124 Ind. 223; 24 N. E. 989; *Oldenburg v. Baird*, 26 Ind. App. 379; 58 N. E. 1073; *William Deering v. Armstrong*, 14 Ind. App. 44; 42 N. E. 372; *Blakeley v. Adams*, — Ky. —; 68 S. W. 393; *Mudd v. Carico*, 104 Ky. 719; 47 S. W. 1080; *Coffin v. Bradbury*, 89 Me. 476; 36 Atl. 988; *Watson v. Perrigo*, 87 Me. 202; 32 Atl. 876; *Lovejoy v. Howe*, 55 Minn. 353; 57 N. W. 57; *Maxfield v. Schwartz*, 43 Minn. 221; 45 N. W. 429; *Porter v. Woods*, 138 Mo. 539; 39 S. W. 794; *State v. Ry.*, 126 Mo. 328; 28 S. W. 1074; *Salmon Falls Bank v. Leyser*, 116 Mo. 51; 22 S. W. 504; *Barnett v. Pratt*, 37 Neb. 349; 55 N. W. 1050; *Wills v. Bank*, 23 Nev. 59; 42 Pac. 490; *Thorpe v. Coal Co.*, 48

N. Y. 253; *Feldman v. McGuire*, 34 Or. 309; 55 Pac. 872; *Strong v. Kamm*, 13 Or. 172; 9 Pac. 331; *Sargent v. Johns*, 206 Pa. St. 386; 55 Atl. 1051; *Townsend v. Long*, 77 Pa. St. 143; 18 Am. Rep. 438; *Wood v. Moriarty*, 15 R. I. 518; 9 Atl. 427; *Urquhart v. Brayton*, 12 R. I. 169; *Mathonican v. Scott*, 87 Tex. 396; 28 S. W. 1063; *Morris v. Gaines*, 82 Tex. 255; 17 S. W. 538; *Keyes v. Allen*, 65 Vt. 667; 27 Atl. 319; *Moore v. Triplett*, 96 Va. 603; 70 Am. St. Rep. 882; 32 S. E. 50; *Skinker v. Armstrong*, 86 Va. 1011; 11 S. E. 977; *Dimmick v. Collins*, 24 Wash. 78; 63 Pac. 1101; *Gilmore v. Box Factory*, 20 Wash. 703; 56 Pac. 934; *Lessel v. Zillmer*, 105 Wis. 334; 81 N. W. 403; *Green v. Hadfield*, 89 Wis. 138; 61 N. W. 310; *Bassett v. Hughes*, 43 Wis. 319.

² *Johns v. Wilson*, 180 U. S. 440; *Keller v. Ashford*, 133 U. S. 610; *Central Trust Co. v. Coal Co.*, 95 Fed. 391; *North Alabama Development Co. v. Orman*, 55 Fed. 18; 5 C. C. A. 22; *Stuyvesant v. Western Mortgage Co.*, 22 Colo. 28; 43 Pac. 144; *Mulvany v. Gross*, 1 Colo. App. 112; 27 Pac. 878; *Tuttle v. Armstead*, 53 Conn. 175; 22 Atl. 677; *Harts v. Emery*, 184 Ill. 560; 56 N. E. 865; *Webster v. Fleming*, 178 Ill. 140; 52 N. E. 975; *Fish v. Glover*, 154 Ill. 86; 39 N. E. 1081; *Stuck-*

out of the loan made by him to the mortgagor enough to pay a prior mortgage, and promises mortgagor to pay such prior mortgage debt, the assignee of such debt may maintain an action against the second mortgagee on such promise.³ This rule is not confined to mortgages. If a grantee assumes and agrees to pay other debts of his grantor's which are liens on the property conveyed, such as vendor's liens,⁴ judgment liens,⁵ or legacies charged on the realty conveyed,⁶ and retains enough from the purchase price to pay such debts, the owner of such debts may maintain an action against the grantee. Furthermore, this principle is not limited to conveyances of realty. If B transfers personalty to A, in consideration of which A promises to pay B's debt to C, which is a lien on the personalty conveyed, C may enforce payment against A.⁷ So if B con-

man v. Roose, 147 Ind. 402; 46 N. E. 680; Lowe v. Hamilton, 132 Ind. 406; 31 N. E. 1117; Beeson v. Green, 103 Ia. 406; 72 N. W. 555; Marble Savings Bank v. Mesarvey, 101 Ia. 285; 70 N. W. 198; Stevenson v. Elliott, 53 Kan. 550; 36 Pac. 980; Cumberland National Bank v. St. Clair, 93 Me. 35; 44 Atl. 123; Flint v. Land Co., 89 Me. 420; 36 Atl. 634; Hine v. Myrick, 60 Minn. 518; 62 N. W. 1125; Pratt v. Conway, 148 Mo. 291; 71 Am. St. Rep. 602; 49 S. W. 1028; Kendall v. Garneau, 55 Neb. 403; 75 N. W. 852; Reynolds v. Dietz, 39 Neb. 180; 58 N. W. 89; Green v. Stone, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; 34 Atl. 1099; reversing, 32 Atl. 706; Wager v. Link, 134 N. Y. 122; 31 N. E. 213; New York Life Ins. Co. v. Aitkin, 125 N. Y. 660; 26 N. E. 732; Moore v. Booker, 4 N. D. 543; 62 N. W. 607; Poe v. Dixon, 60 O. S. 133; 71 Am. St. Rep. 713; 54 N. E. 86; Society of Friends v. Haines, 47 O. S. 423; 25 N. E. 119; Thompson v. Thompson, 4 O. S. 333; Windle v. Hughes, 40 Or. 1; 65 Pac. 1058; Blood v. Levick Co., 177 Pa.

St. 606; 55 Am. St. Rep. 741; 35 Atl. 871; Merriman v. Moore, 90 Pa. St. 78; Mechanics' Savings Bank v. Goff, 13 R. I. 516; 43 Am. Rep. 42; O'Conner v. O'Conner, 88 Tenn. 76; 7 L. R. A. 33; 12 S. W. 447; Beitel v. Dobbin (Tex. Civ. App.), 44 S. W. 299; Thompson v. Cheesman, 15 Utah 43; 48 Pac. 477; Carpenter v. Meachem, 111 Wis. 60; 86 N. W. 552; Morgan v. Lake View Co., 97 Wis. 275; 72 N. W. 872; Enos v. Sanger, 96 Wis. 150; 65 Am. St. Rep. 38; 70 N. W. 1069.

³ Porter v. Ourada, 51 Neb. 510; 71 N. W. 52.

⁴ Saunders v. McClintock, 46 Mo. App. 216; Johnson v. Elmen, 94 Tex. 168; 86 Am. St. Rep. 845; 52 L. R. A. 162; 59 S. W. 253; Strain v. Walton, 11 Tex. Civ. App. 624; 34 S. W. 293.

⁵ Emmitt v. Brophy, 42 O. S. 82; Kehoe v. Patton, 23 R. I. 360; 50 Atl. 655.

⁶ Bird v. Stout, 40 W. Va. 43; 20 S. E. 852.

⁷ Kollock v. Parcher, 52 Wis. 393; 9 N. W. 67.

veys his interest in a business to A, in consideration whereof A agrees to pay B's debts to C arising out of such business, C can maintain an action against A on such contract.⁸ So where one corporation bought the business of another, agreeing therefor to issue certificates of its own stock to the stockholders of the vendor corporation, a stockholder of the vendor may sue on such contract for specific performance.⁹ It is chiefly in connection with promises by a grantee to discharge mortgages and liens that the question has been raised whether such contract is enforceable if the grantor is not personally liable on such debt.¹⁰ If money is deposited by a lessee with a lessor to pay for certain improvements to be made upon the leased premises, the party making such improvements may maintain an action against the lessor.¹¹ On the other hand, an agreement between bondholders who have formed a new company and bought the railroad under foreclosure proceedings to set aside a sum to pay small outstanding claims against the railroad, cannot be enforced by one who had constructed a station for the old company and had not been paid therefor.¹² The payee of a bank check may sue on a contract between a bank and the vendee of stock to pay a check drawn on such bank by the vendee in favor of the vendor for the purchase price of such stock, where the bank receives the proceeds of the resale of such stock amounting to more than the check.¹³ So if a grantee agrees in the deed to himself, that a surety of his grantor's shall have a lien on the realty conveyed to indemnify him, such surety may enforce such deed.¹⁴

⁸ *Rothermell v. Coal Co.*, 79 Ill. App. 667; *Dickson v. Conde*, 148 Ind. 279; 46 N. E. 998; *Lovejoy v. Howe*, 55 Minn. 353; 57 N. W. 57; *Schufeldt v. Smith*, 139 Mo. 367; 40 S. W. 887; *Conner v. Bramble*, 6 Ohio N. P. 195; *Lenz v. Ry.*, 111 Wis. 198; 86 N. W. 607; *J. & H. Clasgens Co. v. Silber*, 93 Wis. 579; 67 N. W. 1122.

⁹ *Fletcher v. Telephone Co.*, 55 N. J. Eq., 47; 35 Atl. 903.

¹⁰ For a discussion of this subject see § 1311.

¹¹ *Beattie Mfg. Co. v. Gerradi*, 166 Mo. 142; 65 S. W. 1035.

¹² *Mayer v. R. R.*, 132 Ind. 88; 31 N. E. 567. (Some stress was here laid on the fact that such sum might have been already expended in paying off prior claims.)

¹³ *Hawley v. Bank*, 97 Ia. 187; 66 N. W. 152.

¹⁴ *Blakeley v. Adams*, — Ky. —; 68 S. W. 393.

§1315. Doctrine not limited to assumption of debts on consideration of conveyance.

The next serious question is this: is the doctrine that a third party may sue, confined to cases like the foregoing, where the promisee transfers property to the promisor to induce him to make such promise, or does it apply to other classes of cases? In some jurisdictions it is held that a promise by A to B, on consideration, to pay B's debts to C is not enforceable unless A has in his hands funds or property transferred by B to him out of which such debt was to be paid. Thus where A agreed with B, a corporation, to discharge B's debt to C, in consideration whereof A was to receive B's stock at par in payment of such advances, C cannot enforce such promise against A.¹ In the majority of the jurisdictions which allow a third person to sue on contracts for his benefit, the doctrine is not thus limited. Thus a contract on valuable consideration between A and B whereby A agrees to support C, can be enforced by C, as a contract whereby A agrees with B his brother-in-law, to support B's wife C,² or a contract by A with B his father-in-law, to support his sister-in-law C.³ If one insurance company reinsures with another, such other company is directly liable to beneficiaries under policies issued by the first company, if it has assumed and agreed to pay losses under such policies.⁴ So a covenant by a lessee with lessor that he will sell no beer upon the premises leased except that manufactured by a specified

¹ Washburn v. Investment Co., 26 Or. 436; 36 Pac. 533; 38 Pac. 620. The court said: "The contract is not made for the direct benefit of the creditor, but of the promisee to enable him to obtain money with which to discharge his liability, and if enforceable at all is enforceable by him. The creditors are, of course, indirectly interested in its performance, for if the contract is complied with, their claims will be paid, and this may be said of any executory contract whereby a debtor expects to receive money with which

to pay his debts; but it has never been held, to our knowledge, that such an interest is sufficient to entitle a stranger to maintain an action to enforce the stipulations of the contract."

² Coleman v. Whitney, 62 Vt. 123; 9 L. R. A. 517; 20 Atl. 322.

³ Eitscheid v. Baker, 112 Wis. 129; 88 N. W. 52.

⁴ Whitney v. Ins. Co. (Cal.), 56 Pac. 50; Bartlett v. Ins. Co., 77 Ia. 155; 41 N. W. 601; Barnes v. Ins. Co., 56 Minn. 38; 45 Am. St. Rep. 438; 57 N. W. 314.

brewing company, may be enforced by such brewing company by an injunction in equity;⁵ a covenant between a landlord and a third person who thereby agrees to maintain a fence on the landlord's property may be enforced by a tenant to whom the landlord has leased such property;⁶ and a contract between the stockholders of a corporation whereby one of them agrees to surrender his stock to the corporation to avoid paying an assessment levied thereon may be enforced by the corporation.⁷ Among other examples of contracts which are intended primarily for the benefit of a third person are the following: A contract between A and B whereby A agrees to pay B's attorney C,⁸ a contract by A, C's husband, whereby A is to furnish B with money to aid in contesting X's will and B agreeing to pay C a large sum of money in the event of success,⁹ a contract between brothers and sisters to whom realty has descended in common that the land shall be held in joint tenancy and on the death of the survivor, it shall pass to the child of one of the brothers,¹⁰ a covenant in a fire insurance policy that the loss, if

⁵ *Ferris v. Brewing Co.*, 155 Ind. 539; 52 L. R. A. 305; 48 N. E. 701. (Citing *Ransdel v. Moore*, 153 Ind. 393, 405; 53 L. R. A. 753; 53 N. E. 767; *Warren v. Farmer*, 100 Ind. 593; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Tinker v. Swaynie*, 71 Ind. 562; *Devol v. McIntosh*, 23 Ind. 529.)

⁶ *Lake Erie, etc., Ry. v. Power*, 15 Ind. App. 179; 43 N. E. 959.

⁷ *Hill v. Mining Co.*, 124 Mo. 153; 46 Am. St. Rep. 429; 25 S. W. 926; 32 S. W. 111.

⁸ *Tyler v. Mayre*, 95 Cal. 160; 27 Pac. 160; 30 Pac. 196.

⁹ *Buchanan v. Tilden*, 158 N. Y. 109; 70 Am. St. Rep. 454; 44 L. R. A. 170; 52 N. E. 724. (In this case there were peculiar facts on which the court laid great stress. B was X's heir. C was the adopted daughter of X's brother. The court said: "Plaintiff, in equity and good conscience, as an adopted child of Moses

Y. Tilden, was entitled to come in and share with the other heirs and next of kin the large fund that had been freed from the provisions of the will. When this equitable right or interest is coupled with the relation of husband and wife, we have presented a situation that affords ample consideration for the contract sued upon,—a situation that distinguishes this action from any of the cases where the party suing upon a promise rests exclusively upon a debt of duty owed him by the promisee. Another general feature of this case, to which we think the court below has failed to give due prominence, is the extent of the legal and moral obligation resting upon a husband to support and provide for his wife."

¹⁰ *Murphy v. Whitney*, 140 N. Y. 541; 24 L. R. A. 123; 35 N. E. 930. (Such child can enforce such contract.)

any, is payable to C as his interest may appear,¹¹ a contract between the father and the mother of an illegitimate child, where the mother surrenders the custody of the child, in consideration whereof the father agrees to support the child, to educate him, and to convey certain property to him,¹² and a bond given by a sub-agent of an insurance company to a general agent containing a clause that the insurance company may sue thereon.¹³ So under a contract between an express company and an employe, whereby he agrees to exempt the express company from certain forms of liability, and the contract provides that this provision shall inure to the benefit of the railroad company, the railroad may use such provision as a defense, even if it had no knowledge thereof before action was brought to enforce such liability.¹⁴

§1316. Contracts of indemnity.

A contract whereby A agrees to indemnify B against loss is usually held not to give any right of action against A to parties holding claims whereby B will be subjected to loss for which he may have indemnity from A.¹ Thus persons injured cannot have an action on a promise by a vendor of stock to protect vendee against debts owed by the corporation to third parties,² nor on a covenant by the lessee of a railway to save the

¹¹ Hence C can sue the insurance company. *West Coast Lumber Co. v. Ins. Co.*, 98 Cal. 502; 33 Pac. 258; *Cone v. Ins. Co.*, 60 N. Y. 619.

¹² *Benge v. Hiatt*, 82 Ky. 666; 56 Am. Rep. 912.

¹³ *New York Life Ins. Co. v. Hamlin*, 100 Wis. 17; 75 N. W. 421. So a rent bond taken by a court for the rent of land not under its control may be enforced by the person establishing the ownership of such land, as upon a ratification of the act of an unauthorized agent. *Parish v. Ross*, 98 Ky. 318; 25 S. W. 266.

¹⁴ *Peterson v. Ry.*, 119 Wis. 197; 96 N. W. 532.

¹ *German State Bank v. Northwestern, etc., Co.*, 104 Ia. 717; 74 N. W. 685; *Union National Bank v. Rich*, 106 Mich. 319; 58 Am. St. Rep. 481; 64 N. W. 339; *Wolf v. Tract Society*, 164 N. Y. 30; 51 L. R. A. 241; 58 N. E. 31; *Reynolds v. Van Beuren*, 155 N. Y. 120; 42 L. R. A. 129; 49 N. E. 763; *French v. Vix*, 143 N. Y. 90; 37 N. E. 612; *Taylor v. Dunn*, 80 Tex. 652; 26 Am. St. Rep. 773; 16 S. W. 732.

² *German State Bank v. Light Co.*, 104 Ia. 717; 74 N. W. 685.

lessor harmless from damages arising out of past accidents,³ nor on a covenant by contractors to indemnify the owner of the building against loss by injury to others.⁴ So a promise by one person on consideration to save another "harmless" from his obligations and liabilities does not enure to the benefit of creditors of the promisee.⁵ If an insurance company A insures B against liability as employer, an employee C, who obtains a judgment against B on a liability of the sort covered by the insurance cannot maintain an action against A, even if B is insolvent.⁶ So an employee who has been injured by the negligence of his employer, causing the explosion of a steam boiler, and who has sued such employer, cannot maintain an action against an insurance company which had agreed to indemnify the employer against such losses.⁷ If, however, the contract is to pay whatever damages the insured might be liable for, and not merely to indemnify him for whatever he may be obliged to pay, the employee is allowed to recover directly against the insurance company where the employer is insolvent.⁸

§1317. Minority American rule.

A minority of American courts have held that a contract between two persons for the benefit of a third confers no right of action upon such third person as against the promisor.¹ In

³ *Hill v. Ry. Co.*, 82 Mo. App. 188.

⁴ *Wolf v. Tract Society*, 164 N. Y. 30; 51 L. R. A. 241; 58 N. E. 31.

⁵ *State v. Ry.*, 125 Mo. 596; 28 S. W. 1074.

⁶ *Frye v. Electric Co.*, 97 Me. 241; 94 Am. St. Rep. 500; 54 Atl. 395; *Bain v. Atkins*, 181 Mass. 240; 92 Am. St. Rep. 411; 57 L. R. A. 791; 63 N. E. 414; *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260; 92 Am. St. Rep. 663; 49 Atl. 720.

⁷ *Embler v. Ins. Co.*, 158 N. Y. 431; 44 L. R. A. 512; 53 N. E. 212.

⁸ *Fenton v. Casualty Co.*, 36 Or. 283; 48 L. R. A. 770; 56 Pac. 1096.

See to the same effect, *Ross v. Ins. Co.*, 56 N. J. Eq. 41; 38 Atl. 22.

¹ *Morgan v. Randolph & Clowes Co.*, 73 Conn. 396; 51 L. R. A. 653; 47 Atl. 658; *Lamkin v. Mfg. Co.*, 72 Conn. 57; 44 L. R. A. 786; 43 Atl. 593, 1042; *Baxter v. Camp*, 71 Conn. 245; 71 Am. St. Rep. 169; 42 L. R. A. 514; 41 Atl. 803; *Meech v. Ensign*, 49 Conn. 191; 44 Am. Rep. 225; *Clapp v. Lawton*, 31 Conn. 95; *Treat v. Stanton*, 14 Conn. 445; *Williamson v. McGrath*, 180 Mass. 55; 61 N. E. 636; *De La Vergne Refrigerating Machine Co. v. Brewing Co.*, 175 Mass. 419; 56 N. E. 584; *Borden v. Boardman*, 157 Mass.

states which enforce this principle, a contract by an applicant for a loan to pay the lender's counsel "his charges for the examination of the title,"² or a contract on consideration whereby A promises B not to sue C on a note,³ cannot be enforced by such third person. A promise by A who owes B money on a contract of employment,⁴ or as income due him from an estate,⁵ to pay to C the amount thus owing by A to B, or a promise by A, a husband, to B, his wife, to pay C, her son, money loaned by B to A,⁶ can none of them be enforced by C. A promise by A to whom B has paid funds under a contract with him to pay to C out of such funds a debt due him from B, cannot be enforced by C.⁷ A promise by a prospective devisee to testator, in consideration of the devise,

410; 32 N. E. 469; *Saunders v. Saunders*, 154 Mass. 337; 28 N. E. 270; *Marsten v. Bigelow*, 150 Mass. 45; 5 L. R. A. 43; 22 N. E. 71; *Rogers v. Stone Co.*, 130 Mass. 581; 39 Am. Rep. 478; *Linnemann v. Moross*, 98 Mich. 178; 39 Am. St. Rep. 528; 57 N. W. 103; *Wheeler v. Stewart*, 94 Mich. 445; 54 N. W. 172; *Edwards v. Clement*, 81 Mich. 513; 45 N. W. 1107. "It must now be regarded as the settled general rule in this state that where A simply agrees with B upon a valid consideration to assume and pay B's debts and save B harmless therefrom, C, a creditor of B, cannot maintain an action at law against A for his refusal to pay the debt due from B to C." *Morgan v. Clowes Co.*, 73 Conn. 396, 397; 51 L. R. A. 653; 47 Atl. 658. In *Coffey v. Shuler*, 112 N. C. 622; 16 S. E. 911, it was said that a promise for the benefit of a third person cannot be enforced by such third person, citing *Morehead v. Wriston*, 73 N. C. 398; 21 Am. Rep. 470. But *Coffey v. Shuler* is a case in which there was no consideration for the promise. The principle that a

third person may enforce the contract is recognized in *Gorrell v. Water Supply Co.*, 124 N. C. 328; 70 Am. St. Rep. 598; 46 L. R. A. 513; 32 S. E. 720; *Haun v. Burrell*, 119 N. C. 544; 26 S. E. 111; *Sams v. Price*, 119 N. C. 572; 26 S. E. 170.

² *Williamson v. McGrath*, 180 Mass. 55; 61 N. E. 636.

³ *Marsten v. Bigelow*, 150 Mass. 45; 5 L. R. A. 43; 22 N. E. 71. Citing *Exchange Bank v. Rice*, 107 Mass. 37; 9 Am. Rep. 1.

⁴ *Wheeler v. Stewart*, 94 Mich. 445; 54 N. W. 172.

⁵ *Saunders v. Saunders*, 154 Mass. 337; 28 N. E. 270. The promise was made to the husband and the wife. Substantially the same conclusion has been reached in states which usually allow a third person to enforce a contract for his benefit. *Sullivan v. Sullivan*, 161 N. Y. 554; 56 N. E. 79.

⁶ *Baxter v. Camp*, 71 Conn. 245; 71 Am. St. Rep. 169; 42 L. R. A. 514; 41 Atl. 803.

⁷ *Borden v. Boardman*, 157 Mass. 410; 32 N. E. 469.

to pay a certain sum of money monthly to one to whom such devise had been given by a previous will cannot be enforced by such third person.⁸ Where property is transferred by a partnership to a corporation in consideration of a promise by the corporation to pay the partnership debts, creditors of the partnership cannot enforce such contract,⁹ and where B transferred a note to A under A's promise to pay B's debt to C,¹⁰ C cannot enforce such contract against A. So it has been held that a grantee who promises to pay grantor's debts is liable to the grantor's creditors only in case of express agreement among the three parties.¹¹

§1318. Right of third person to enforce contract in equity.

The right of a third person to enforce a contract made for his benefit was recognized in equity at an early date,¹ and has been constantly enforced in most jurisdictions.² It may be here observed that on this point the English cases are not harmonious. The cases in which the third person is allowed to sue may be explained as cases of trust. If A has received property from B under a promise to pay B's debt to C, and such debt is less than

⁸ *Linneman v. Moross*, 98 Mich. 178; 39 Am. St. Rep. 528; 57 N. W. 103.

⁹ *Morgan v. Clowes Co.*, 73 Conn. 396; 51 L. R. A. 653; 47 Atl. 658.

¹⁰ *Austell v. Humphries*, 99 Ga. 408; 27 S. E. 736. B had agreed orally with C that he should be paid out of the proceeds of such notes and A knew of such agreement.

¹¹ *Keller v. Ashford*, 133 U. S. 610; *Shepherd v. May*, 115 U. S. 505. A similar view was expressed in *Winters v. Mining Co.*, 57 Fed. 287, but in this case an action foreclosing the mortgage given to secure the debt in question had been brought, and subsequently a personal judgment had been sought.

¹ *Gregory v. Williams*, 3 Mer. 582; *Miller v. Billingsley*, 41 Ind. 489. In Tennessee the court as-

sumes that in equity a third person could sue on a contract for his benefit; and by analogy, extended the equity rule to actions at law, saying: "It may be that this distinction between a remedy at law or in equity ought not to be longer maintained." *Moore v. Stovall*, 2 Lea (Tenn.) 543, 544.

² *McKee v. Lamon*, 159 U. S. 317; *Blackmore v. Parkes*, 81 Fed. 899; 26 C. C. A. 670; *Davis v. Calloway*, 30 Ind. 112; 95 Am. Dec. 671; *Thompson v. Bertram*, 14 Ia. 476; *Harvey v. Milk Co.*, 92 Me. 115; 42 Atl. 342; *Palmer v. Bray*, — Mich. —; 98 N. W. 849; *Crawford v. Edwards*, 33 Mich. 354; *Zell's Appeal*, 111 Pa. St. 532; 6 Atl. 107; *O'Connor v. O'Connor*, 88 Tenn. 76; 7 L. R. A. 33; 12 S. W. 447.

the value of the property it is not always apparent whether A is personally liable for the whole debt or whether his liability is measured by the value of the property in his hands. It has been said that as a general rule A is not personally liable to third persons on such contracts.³ The American authorities recognize the right of the third person to sue in equity, with substantial unanimity. Thus where A, an attorney, agreed with an Indian nation to collect a claim for them for a certain percentage, out of which he agreed to adjust claims of "all parties who have rendered service heretofore in the prosecution of said claim," it was held that another attorney who had rendered such service could maintain a suit in equity against A.⁴ So where B conveys realty to A, and as part of the consideration therefor A agrees to pay B's debts, A is liable in equity personally to B's creditors.⁵ A common example of this principle is found where a grantee assumes and agrees to pay a mortgage which is a lien on such premises.⁶ Occasionally a case appears in which the grantee is held not liable at law to the grantor's creditors, though possibly liable in equity to the extent of the property conveyed.⁷ So in some jurisdictions where the party to be benefited is not named specifically he may sue in equity though not at law.⁸ Whatever the original divergence between equity and the law on this point, the development of principles of equity within Modern Law has made the present attitude of the law on this question substantially the same as that of equity in most jurisdictions. Perfect simplicity and uniformity of statement on this point is prevented by the attitude of those courts which hold that a grantee who assumes his grantor's debt is liable to his grantor's creditors in equity upon principles assumed to be analogous to subrogation.⁹

³ Colyear v. Mulgrave, 2 Keen 81.

⁴ "A court of equity is the proper tribunal for the adjustment of their respective claims." McKee v. Laman, 159 U. S. 317.

⁵ Blackmore v. Parkes, 81 Fed. 899; 26 C. C. A. 670.

⁶ Thompson v. Bertram, 14 Ia. 476; Crawford v. Edwards, 33 Mich.

354; O'Connor v. O'Connor, 88 Tenn. 76; 7 L. R. A. 33; 12 S. W. 447.

⁷ Capital Traction Co. v. Offutt, 17 App. D. C. 292; 53 L. R. A. 390.

⁸ Harvey v. Milk Co., 92 Me. 115; 42 Atl. 342.

⁹ Keller v. Ashford, 133 U. S. 610; Corning v. Burton, 102 Mich. 86, 96; 62 N. W. 1040; Booth v.

The right of the mortgagee to hold the grantee personally liable is said to require two other concurrent rights: first, the mortgagee must have the right to collect any deficiency from the mortgagor and, second, the mortgagor must have the right to be reimbursed by the grantee.¹⁰ The co-existence of these rights gives the mortgagee a right to proceed directly against the grantee.¹¹ As far as expressions of opinion go, this principle is thoroughly settled in these states.¹² The doctrine of equitable subrogation as a basis for the liability of third persons is of very doubtful value in most jurisdictions. The results obtained from its application are generally the same as those resulting from the Common Law rule that the promisor is personally liable to a third person for whose benefit the promise is made. The same results could have been reached under the Common Law rule held by the majority of American courts; not that they always are so reached by the courts, but that they can be reached under the general rule. Furthermore this Common Law rule is in force in most of the states in

Ins. Co., 43 Mich. 299; 5 N. W. 381; Crawford v. Edwards, 33 Mich. 354; Biddle v. Pugh, 59 N. J. Eq. 480; 45 Atl. 626; Crowell v. St. Barnabas, 27 N. J. Eq. 650; Garnsey v. Rogers, 47 N. Y. 233; 7 Am. Rep. 440; Burr v. Beers, 24 N. Y. 179; 80 Am. Dec. 327; Osborne v. Cabell, 77 Va. 462.

¹⁰ Biddle v. Pugh, 59 N. J. Eq. 480; 45 Atl. 626; Green v. Stone, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; 34 Atl. 1099; reversing, 32 Atl. 706.

¹¹ The mortgagee's right to sue exists "to avoid circuitry of action" and "not because of any right originally in the mortgagee." Biddle v. Pugh, 59 N. J. Eq. 480; 45 Atl. 626; Crowell v. St. Barnabas, 27 N. J. Eq. 650.

¹² "By a well settled doctrine of equity the mortgagee as a creditor may by way of subrogation have

the benefit of all collateral obligations which a person standing in the situation of a surety for another holds for his indemnity." Green v. Stone, 54 N. J. Eq. 387, 390; 55 Am. St. Rep. 577; 34 Atl. 1099; reversing (N. J. Eq.), 32 Atl. 706. The creditor's right to recover rests on "a well known rule in equity that a creditor is entitled to the benefit of any obligations or securities given by his debtor to one who has become surety of his debtor for the payment of the debt." Hopkins v. Warner, 109 Cal. 133, 136; 41 Pac. 868; quoted in Ward v. De Oca, 120 Cal. 102, 105; 52 Pac. 130; or on the "familiar principle that the creditor is entitled by way of equitable subrogation to all the securities held by a surety of the principal debtor." Osborne v. Cabell, 77 Va. 462, 467.

which this equitable doctrine obtains. It seems to lead only to confusion to retain both doctrines side by side when the Common Law doctrine can from its nature apply equally well to equity cases, and when it includes all the cases included by the equity rule, and more. The retention of the equity rule has therefore been criticised.¹³ In states which do not recognize the right of the third person to sue at Common Law, the equitable doctrine is of course important, as being the only means of enforcing the grantee's liability. Thus in Michigan the grantee is personally liable in equity, on principles of subrogation,¹⁴ though he is not liable at law.¹⁵ This doctrine has been extended to allow a creditor to enforce in equity a bond of indemnity against encumbrances, of which his claim is one.¹⁶ The courts which hold to the doctrine of subrogation as the basis of the right of the third person to sue, do not agree whether the right is independent of the right to foreclose or only collateral to it, some holding that the mortgagee can sue the grantee in equity without resorting to foreclosure,¹⁷ others that he can sue only after a sale of the realty and a report of a deficiency, and then of course only for the deficiency.¹⁸ It has been invoked as a basis for holding that the promisor is not liable if his grantee was not personally liable;¹⁹

¹³ "In *Thorp v. Keokuk Coal Co.*, 48 N. Y. 258, the court said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case. When the law has absorbed, in a broader equity, the narrower one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake." *Gifford v. Corrigan*, 117 N. Y. 257, 264; 15 Am. St. Rep. 508; 6 L. R. A. 610; 22 N. E. 756.

¹⁴ *Corning v. Burton*, 102 Mich. 86, 96; 62 N. W. 1040, 1041; *Booth v. Ins. Co.*, 43 Mich. 299; 5 N. W. 381; *Crawford v. Edwards*, 33 Mich. 354.

¹⁵ *Hicks v. McGarry*, 38 Mich. 667.

¹⁶ *Smith v. Peace*, 1 Lea (Tenn.) 586.

¹⁷ *Green v. Stone*, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; 34 Atl. 1099; reversing (N. J. Eq.) 32 Atl. 706; *Pruden v. Williams*, 26 N. J. Eq. 210.

¹⁸ *Mickle v. Maxfield*, 42 Mich. 304; 3 N. W. 961.

¹⁹ *Ward v. De Oca*, 120 Cal. 102; 52 Pac. 130; *Trotter v. Hughes*, 12 N. Y. 74; 62 Am. Dec. 137. In accordance with this view are the obiters in *Biddle v. Pugh*, 59 N. J. Eq. 480; 45 Atl. 626; *Crowell v. Barnabas*, 27 N. J. Eq. 650.

that failure of such third person to perform the contract between himself and the promisee would discharge the promisor;²⁰ that if the grantor does not see fit to interpose a defense to his liability to the mortgagee, his grantee who has assumed the debt cannot interpose such defense;²¹ that a payment of interest on the mortgage debt, made by the grantee, prevents limitations from running;²² or for allowing reformation in a proper case and thereby eliminating a covenant to assume and pay a debt of the grantor's.²³

§1319. Right of third person to sue on bonds.

The principles discussed in the preceding sections with reference to the necessity of an intention to benefit the third person directly have been applied to actions upon bonds. If a contractor who is erecting a building or other improvement enters into a contract with, or gives bond to, the owner of the realty upon which such improvement is erected to pay all claims of persons furnishing material or labor in the erection of such improvements, many authorities hold that persons who furnish such material and labor may maintain an action on such bond.¹ Thus C had agreed with B, a county, for which

²⁰ Osborne v. Cabell, 77 Va. 462.

²¹ Crawford v. Edwards, 33 Mich. 354; Comstock v. Smith, 26 Mich. 307.

²² Biddle v. Pugh, 59 N. J. Eq. 480; 45 Atl. 626.

²³ Bull v. Titsworth, 29 N. J. Eq. 73.

¹ Wells v. Kavanaugh, 70 Ia. 519; 30 N. W. 871; Baker v. Bryan, 64 Ia. 561; 21 N. W. 83; Jordan v. Kavanaugh, 63 Ia. 152; 18 N. W. 851; American Surety Co. v. Cement Co., 9 Kan. App. 8; 57 Pac. 237; Knapp v. Swaney, 56 Mich. 345; 56 Am. Rep. 397; 23 N. W. 162; Sepp v. McCann, 47 Minn. 364; 50 N. W. 246; School District v. Livers, 147 Mo. 580; 49 S. W. 507; Devers v. Howard, 144 Mo. 671; 46 S. W.

625; St. Louis v. Von Phul, 133 Mo. 561; 54 Am. St. Rep. 695; 34 S. W. 343; Board, etc., v. Woods, 77 Mo. 197; Kaufman v. Cooper, 46 Neb. 644; 65 N. W. 796; Lyman v. Lincoln, 38 Neb. 794; 57 N. W. 531; Sample v. Hale, 34 Neb. 220; 51 N. W. 837; State v. Liebes, 19 Wash. 589; 54 Pac. 26. (Distinguishing Breen v. Kelly, 45 Minn. 352; 47 N. W. 1067, and also Clough v. Spokane, 7 Wash. 279; 34 Pac. 934, and State v. Cheetham, 17 Wash. 131; 49 Pac. 227 (the last case on the ground that the special board in question could not create any liability against the fund other than to the contractor because of the limited power given to it by the legislature.) Overruling. Sears v. Wil-

he was doing certain work, to look to the other contractors on the same piece of work for all damages due to their delays. A knowing of C's covenant agreed with B to construct certain iron work in a certain time so as not to delay C. A broke this covenant. It was held that C could recover from A for such breach.² Some courts, however, deny the right of persons who furnish material or labor,³ to maintain an action on a bond given by the builder to the party for whom he is constructing the improvement. Some courts place this last holding on the theory that the contract was primarily for the benefit of the promisee, and not for the benefit of the parties furnishing material and labor. A covenant in a bond to pay for labor and material furnished to the obligor to enable him to perform his contract with the obligee is sufficient to enable third persons furnishing material to maintain an action thereon.⁴ The same rule applies where the contract between the city and the contractor provides that the city shall make no payment under the contract until all claims for labor and material shall have been adjusted, the city being authorized to apply money due under the contract to the payment of such claims,⁵ and even where the contractors' bond merely is conditioned that they "shall file with the board of public works receipts of claims from all persons furnishing them with material and labor in the construction of such engine houses."⁶ In other jurisdic-

liams, 9 Wash. 482; 37 Pac. 665, majority opinion; 39 Pac. 280, minority opinion; rehearing denied, 38 Pac. 135.

² Grant v. Lock Co., 77 Wis. 72; 45 N. W. 951.

³ State v. McCray, 5 Ind. App. 350; 32 N. E. 341; Spradling v. McNess (Ky.), 43 S. W. 765; Jefferson v. Asch, 53 Minn. 446; 39 Am. St. Rep. 618; 25 L. R. A. 257; 55 N. W. 604; Brower, etc., Lumber Co. v. Miller, 28 Or. 565; 52 Am. St. Rep. 807; 43 Pac. 659; Parker v. Jeffrey, 26 Or. 186; 37 Pac. 712; Jones Lumber Co. v. Villegas, 8

Tex. Civ. App. 669; 28 S. W. 558; Santleben v. Cement Co. (Tex. Civ. App.), 25 S. W. 143; Montgomery v. Rief, 15 Utah 495; 50 Pac. 623; Electric Appliance Co. v. Guaranty Co., 110 Wis. 434; 53 L. R. A. 609; 85 N. W. 648.

⁴ American Surety Co. v. Cement Co., 9 Kan. App. 8; 57 Pac. 237; Devers v. Howard, 144 Mo. 671; 46 S. W. 625; Kaufmann v. Cooper, 46 Neb. 644; 65 N. W. 796.

⁵ State v. Liebes, 19 Wash. 589; 54 Pac. 26.

⁶ Lyman v. Lincoln, 38 Neb. 794; 57 N. W. 531.

tions such covenants are held not to enure to the benefit of the third person.⁷ Other courts base their decision on the ground that the promisor is not liable unless the promisee has put funds in his hands to pay to the third persons,⁸ or some other legal liability exists from the promisee to third persons.⁹

§1320. Bonds controlled by special statute.

A different question arises where a bond is given in compliance with a statute which names the obligee and prescribes who may sue thereon. Under statutes allowing suit by the party aggrieved, such party may sue in his own name, without reference to the obligee.¹ Thus where the bond is made payable to the state, the county may sue on a bond for the release of personalty seized for taxes,² or on the bond of a defaulting tax-collector,³ since the county is in the first instance liable for the collection of taxes. So the beneficiaries of insurance policies may sue on a bond given by the insurer to the state,⁴

⁷ In Wisconsin a promise to turn over a building to the city free of all claims and to give receipts for claims against such building does not enure to the benefit of a party who furnishes material. *Electric Appliance Co. v. Guaranty Co.*, 110 Wis. 434; 53 L. R. A. 609; 85 N. W. 648. This rule applies where the owner is not to pay the contractor until he is satisfied that there are no mechanics' liens on the building. *Campbell v. Carnegie*, 98 Wis. 99; 73 N. W. 572. To the same effect see *Holly Mfg. Co. v. Water Co.*, 48 Fed. 879; *Parker v. Jeffrey*, 26 Or. 186; 37 Pac. 712; *Montgomery v. Rief*, 15 Utah 495; 50 Pac. 623.

⁸ *Washburn v. Investment Co.*, 26 Or. 436; 36 Pac. 533; 38 Pac. 620; *Parker v. Jeffrey*, 26 Or. 186; 37 Pac. 712.

⁹ *Jefferson v. Asch*, 53 Minn. 446; 39 Am. St. Rep. 618; 25 L. R. A. 257; 55 N. W. 604. See § 1311.

¹ *Washington Corporation v. Young*, 10 Wheat. (U. S.) 406; *Union Guaranty and Trust Co. v. Robinson*, 79 Fed. 420; *Williams v. Simons*, 70 Fed. 40; 16 C. C. A. 628; *Hubert v. Mendheim*, 64 Cal. 213; 30 Pac. 633; *Morton v. Power*, 33 Minn. 521; 24 N. W. 194; *St. Paul v. Butler*, 30 Minn. 459; 16 N. W. 362; *Hume v. Kelly*, 28 Or. 398; 43 Pac. 380; *Crook County v. Bushnell*, 15 Or. 169; 13 Pac. 886; *Governor v. Allen*, 8 Humph. (Tenn.) 176; 47 Am. Dec. 601.

² *Curry v. Gila County*, — Ariz. —; 53 Pac. 4; citing *Mendocino County v. Lamar*, 30 Cal. 628; *Sacramento County Supers. v. Bird*, 31 Cal. 67; *Mendocino County v. Morris*, 32 Cal. 145.

³ *Hume v. Kelly*, 28 Or. 398; 43 Pac. 380.

⁴ *Union Guaranty and Trust Co. v. Robinson*, 79 Fed. 420.

or the United States may sue on a sheriff's bond for the escape of a Federal Prisoner.⁵ Any person injured by breach of a liquor-dealer's bond, payable to the state, may sue thereon.⁶ So claimants of property attached may sue on an indemnity bond given to the sheriff.⁷ Persons to whom an examination and inspection of ballots is referred on an election contest may sue on contestant's bond;⁸ an assignee in insolvency may sue in his official capacity on a bond given by the debtors on appeal from a decision adjudging them insolvent;⁹ officers entitled to costs may sue on a supersedeas bond given to the adversary party, conditioned to pay to him the "value of the use and occupation of the property" in litigation; and "to pay all costs";¹⁰ and a judgment creditor may sue in his own name on a supersedeas bond made payable by mistake to the clerk.¹¹ If an officer whose duty it is to collect taxes by making a levy on personalty in the first instance, does not do so, and thereby causes the tax to be collected out of realty, to the damage of a mortgagee thereof, such mortgagee has been allowed to maintain an action on the bond of such officer.¹²

§1321. Right of third person to enforce sealed instrument.

Whether a contract under seal, if intended for the benefit of a third party, may be enforced by him is a question upon which there is a divergence of opinion in jurisdictions where a third person can enforce a simple contract for his benefit. The original Common Law rule was that no action could be maintained on an indenture except by the parties thereto,¹ but a third

⁵ *State v. Hill*, 60 Fed. 1005; 24 L. R. A. 170.

⁶ *McGuire v. Glass*, 4 Tex. App. Civ. 78; 15 S. W. 127.

⁷ *Williams v. Simons*, 70 Fed. 40; 16 C. C. A. 628.

⁸ *Moede v. Haines*, 66 Minn. 419; 69 N. W. 216; denying the authority of, *Dallas v. Savings Co.*, 158 Pa. St. 444; 27 Atl. 1055.

⁹ *Court of Insolvency v. Meldon*, 69 Vt. 510; 38 Atl. 167.

¹⁰ *Curry v. Homer*, 62 O. S. 233; 56 N. E. 870.

¹¹ *Babcock v. Carter*, 117 Ala. 575; 67 Am. St. Rep. 193; 23 So. 487.

¹² *Raynsford v. Phelps*, 43 Mich. 342; 38 Am. Rep. 189; 5 N. W. 403. (In this case the officer made a false return of "no goods.") *Contra*, *State v. Harris*, 89 Ind. 363; 46 Am. Rep. 169.

¹ *Huckabee v. May*, 14 Ala. 263;

person could maintain an action on a deed-poll against the party executing it if he could sue on a simple contract.² The modern rule, influenced in part by statutes allowing a sealed instrument to be treated for purposes of bringing actions as if it were unsealed, allows third persons to sue on sealed contracts wherever they could sue on simple contracts.³ Where a third person cannot sue on a simple contract for his benefit he cannot of course sue on a sealed contract.⁴

§1322. Right of promisee to enforce contract.

Whether the promisee may bring an action on a contract made by him for the benefit of another, is a question on which there is some difference of opinion. In some jurisdictions the original promisee may maintain an action for the breach of such a contract. Thus A agreed with B to care for B's infant daughter C as his own. Instead of so doing he had her committed to the county asylum for common paupers. It was held

Haskete v. Flint, 5 Blackf. (Ind.) 69; 33 Am. Dec. 452; Farmington v. Hobert, 74 Me. 416; How v. How, 1 N. H. 49; Loeb v. Barris, 50 N. J. L. 382; 13 Atl. 502; Jenricus v. Englert, 137 N. Y. 488; 33 N. E. 550; De Bolle v. Pennsylvania Ins. Co., 4 Whart. (Pa.) 68; 33 Am. Dec. 38; Woonsocket Rubber Co. v. Banigan, 21 R. I. 146; 42 Atl. 512; Fairchild v. Ins. Association, 51 Vt. 613. The same view has been expressed in Illinois. Harms v. McCormick, 132 Ill. 104; 22 N. E. 511; Home Library Association v. Witherow, 50 Ill. App. 117; Gridley v. Bayless, 43 Ill. App. 503; but this has been held incorrect in Webster v. Fleming, 178 Ill. 140; 52 N. E. 975.

² Fellows v. Gilman, 4 Wend. (N. Y.) 414.

³ Webster v. Fleming, 178 Ill. 140; 52 N. E. 975; Rogers v. Gosnell, 51 Mo. 466; Emmitt v. Brophy,

42 O. S. 82; Coster v. Albany, 43 N. Y. 399; Hughes v. Navigation Co., 11 Or. 437; 5 Pac. 206; Stites v. Thompson, 98 Wis. 329; 73 N. W. 774; Bassett v. Hughes, 43 Wis. 319; McDowell v. Laev, 35 Wis. 171. "The cases in which one not a party to a contract may sue upon a promise in it for his benefit were at one time limited to contracts not under seal, and this court in stating the law on the subject in Follansbee v. Johnson, 28 Minn. 311; 9 N. W. 882, expressed that limitation; but the distinction in this respect between contracts by specialty and simple contracts has not in the later authorities been adhered to and may now be regarded as abandoned." Jefferson v. Asch, 53 Minn. 446, 448; 39 Am. St. Rep. 618; 25 L. R. A. 257; 55 N. W. 604.

⁴ Flynn v. Ins. Co., 115 Mass. 449; Huntington v. Knox, 7 Cush (Mass.) 371.

that B could sue on such contract.¹ So where a city makes a contract with a gas company, requiring it not to charge private consumers more than a specified rate, it is held that in case of breach the city, though not a consumer may have an injunction and may recover nominal damages.² Under statutes authorizing a party in whose name a contract is made with another to sue thereon in his own name, the obligee of such bonds may sue thereon. Thus a contestee to whom a bond in an election contest is made payable,³ or a sheriff to whom a forthcoming bond is made payable,⁴ may sue in his own name. On the other hand it has been held that the covenant in a deed by which grantee assumes and agrees to pay the mortgage debt of grantor is a written promise to the creditor, not to the grantor.⁵ Recovery in quasi-contract has been allowed. Thus B furnished board and lodging to A, under an oral contract by which A was to pay therefor by transferring certain realty to B's children. The contract could not be enforced by reason of the statute of frauds. It was held that B could recover a reasonable compensation for such board from A.⁶

¹ *Vancleave v. Clark*, 118 Ind. 61; 3 L. R. A. 519; 20 N. E. 527.

² *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97; 60 L. R. A. 822; 66 N. E. 436.

³ *Hilliard v. Brown*, 103 Ala. 318; 15 So. 605.

⁴ *Clark v. Horn*, 99 Ga. 165; 25 S. E. 203; *Romero v. Wagner*, 3 N. M. 167; 3 Pac. 50.

⁵ It is an implied contract to pay

the grantor whatever he may be obliged to pay thereon; and the statute of limitations applicable to written contracts does not control. *Poe v. Dixon*, 60 O. S. 124; 71 Am. St. Rep. 713; 54 N. E. 86.

⁶ *Gay v. Mooney*, 67 N. J. L. 687; 52 Atl. 1131; affirming without opinion, *Gay v. Mooney*, 67 N. J. L. 27; 50 Atl. 596.

CHAPTER LXI.

INTERFERENCE WITH CONTRACT.

I. GENERAL NATURE.

§1323. Doctrine of interference with contract rights.

We have thus far discussed the effect of a contract as between the parties to the contract, and the nature of the rights which it may confer upon third parties. There remains for consideration the question of the liability which a contract imposes upon third persons, and the extent to which they are bound to refrain from interfering with it. Stating the question in another way, a contract right as between the parties thereto is a right *in personam*. To what extent is it, as to third parties a right *in rem* which they are bound to respect like other property rights, and to what extent is the right of a person to make contracts in the future a right which others are bound to respect? This is of course a question of tort, and belongs in a discussion of that subject. It is considered here only to complete the statement of the place of the contract in law. The subject must be considered with reference to interference (1) by an individual and (2) by a combination of persons acting in conspiracy. The interference may further be directed against (1) a contract already in existence, or (2) the right of a person to make contracts, though no specific contract has been made. Furthermore the interference may be (1) by persuading a party to the contract to break it; or (2) by making it impossible for him to perform it. This has been said to be "a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century."¹

¹ Bohn Mfg. Co. v. Hollis, 54 319; 21 L. R. A. 337; 55 N. W. Minn. 223, 231; 40 Am. St. Rep. 1119.

§1324. Contract need not be for definite time.

Intermediate between ordinary cases of interference with an existing contract, and cases of the prevention of future contracts are cases of existing contracts which can be terminated at the option of one of the parties thereto. The question is then presented whether interference whereby such person is induced to exercise such option is a tort. The weight of authority is that such conduct amounts to a tort if interference with a contract not voidable at the option of the party would be a tort. Thus it is a tort to induce an employer to discharge an employee,¹ or to induce an employee to quit work,² even if there is no employment for any fixed time. So a combination to cause the discharge of one whom his employer could discharge at his pleasure at the end of any week is a tort.³ Where no action lies for causing breach of a contract of employment for an indefinite time it is either because in that jurisdiction no action lies even if the contract is for a definite time,⁴ or because the discharge is for other reasons not wrongful.⁵ So a combination to induce or coerce customers to quit dealing with one with whom they have no binding contracts but with whom they are in the habit of dealing is actionable in tort.⁶ In some states, however, the fact that the party induced to terminate the contract has a legal right so to do prevents conduct of a third person who causes him to terminate it from being a tort, though it would have been a tort had such right to terminate it not existed. Thus A, a vendor of land, had agreed that B might withdraw from the contract for any reason that

¹ *Chipley v. Atkinson*, 23 Fla. 206; 11 Am. St. Rep. 367; 1 So. 934.

² *Walker v. Cronin*, 107 Mass. 555.

³ *Lucke v. Trimmers' Assembly*, 77 Md. 396; 39 Am. St. Rep. 421; 19 L. R. A. 408; 26 Atl. 505.

⁴ *Baker v. Ins. Co. (Ky.)*, 64 S. W. 913; *Trimble v. Ins. Co. (Ky.)*, 64 S. W. 915.

⁵ *Lancaster v. Hamburger*, 70 O. S. 156; 71 N. E. 289 (where the

party causing the discharge was a patron of the employer's street railway who made a justifiable complaint of employe's conduct; thereby causing his discharge). *Raycroft v. Tayntor*, 68 Vt. 219; 54 Am. St. Rep. 882; 33 L. R. A. 225; 35 Atl. 53 (where the party causing the discharge was in fact a foreman with full power to discharge).

⁶ *Quinn v. Leathem* (1901), App. Cas. 495; affirming *Leathem v. Craig*, 2 Ir. Rep. (1899) 667.

he saw fit. X, a broker, who negotiated the sale, made false and fraudulent representations to B and thereby induced him to withdraw from such contract. It was held that A had no right of action against B.⁷

§1325. Interference not tortious unless wrongful.

It is axiomatic that an act does not amount to a tort unless it is at least wrongful. One who without negligence does an act which he has a right to do, does not thereby incur liability as a wrong-doer. But while this principle is recognized in the cases generally, including those on this topic, the application of so general and vague a principle to facts treated of in this chapter, on which the law is so unsettled, results in considerable conflict. Interference with an existing contract is almost always wrongful.¹ If the interference is intended to injure the party who loses the benefit of the contract or to benefit the party who interferes, it is ordinarily wrongful. Yet even in cases of this sort it has been held that the refusal of members of a trades-union to work for an employer unless he discharged employes who were members of a rival union was not wrongful.² This principle, where recognized, is referred to the doctrine of the right of competition. If employes ask advice of others as to the line of conduct to be pursued by them for their own interests, the parties giving such advice are not liable to the employers for damages, even if as a result thereof the workmen discontinue work. A recent case in England illustrates this proposition.³ In this case the workmen, coal miners, were paid on a sliding scale, their wages varying with the price of coal. The workmen, believing that the wholesalers who bought the coal from the employers of such workmen were using unfair means to force the price down, consulted their organization, and were advised to stop work on certain specified dates, as a demonstration to prevent such conduct in fore-

⁷ *Hetzler v. Morrell*, 82 Ia. 562;
48 N. W. 938.

¹ See § 1326 *et seq.*

² *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; 53 Atl. 230;
National Protective Union v. Cum-

ming, 170 N. Y. 315; 88 Am. St. Rep. 648; 58 L. R. A. 135; 63 N. E. 369.

³ *Glamorgan Coal Co. v. South Wales Miners' Federation* (1907), 1 K. B. 118.

ing down the price. It will be observed that this was not strictly a strike, although work was discontinued, and it was done to influence the conduct not of the employers but of other persons. It was held that if the advice to stop work on certain days was given honestly, without malice, though the persons giving it knew of the existing contracts of the miners with their employers, such facts constitute lawful justification and excuse. Passing from a consideration of interference with existing contracts to prevention of future contracts, we find that, if the interference is the result of competition and consists in the offer of lower rates, better facilities and the like, no wrongful act has been committed, no matter how great the damage may be.⁴ Even where a combination to wreck a business for the purpose of injuring the owner thereof, is a tort,⁵ it is held that a combination between a wholesale oil company and certain oil producers, by which the wholesale company induced the producers to ship by a pipe line controlled by such oil company, the oil company refusing to buy oil unless it is shipped by that line, does not give the right of action in tort to another pipe line from which a great amount of business has thus been diverted.⁶ As will be seen from the following sections, the wrongful acts generally relied upon are (1) refusal to deal with one who employs or deals with certain others; (2) threats or violence as a means of preventing carrying on of business. The only serious conflict on the second of these propositions is at what point persuasion passes into threats. Upon the first proposition there is hopeless conflict of authorities. The first question, therefore, to be considered, namely, what is a wrongful interference with contract is one upon which there is divergence of opinion. Upon the next question

⁴ *Mogul S. S. Co. v. McGregor* (1892), App. Cas. 25; affirming L. R. 23 Q. B. 598.

⁵ "If one wantonly or maliciously, whether for his own benefit or not, induce a person to violate his contract with a third person to the injury of that third person, it is actionable." From syllabus of *West*

Virginia Transportation Co. v. Oil Co., 50 W. Va. 611; 88 Am. St. Rep. 895; 56 L. R. A. 804; 40 S. E. 591.

⁶ *West Virginia Transportation Co. v. Oil Co.*, 50 W. Va. 611; 88 Am. St. Rep. 895; 56 L. R. A. 804; 40 S. E. 591.

to be discussed, namely, whether the injured party has a right of action against the party who is guilty of a wrongful act in interfering with contract, there is even greater conflict.⁷

II. INTERFERENCE BY INDIVIDUAL.

§1326. Interference with existing contract.— Doctrine of *Lumley v. Gye*.

In considering the question of the liability of an individual who induces one person to break his contract with another we are met at the outset by a hopeless difference of authority as to the general principle underlying the subject. Does this principle apply to all contracts or only to certain classes of contracts such as contracts of employment? On this question there is such divergence as to make a general statement impossible. Considering first, therefore, contracts of employment, we find that the leading case at Modern Law is *Lumley v. Gye*.¹ A had a contract with B to sing at B's theater. X induced A to break her contract with B. B sued X for damages, and it was held that B could recover. This case was decided by a divided court, the majority of which agreed that there should be a recovery, but differed as to the ground on which recovery should be placed. One judge took the view that such interference with any contract was a tort; one, that the tort existed wherever a contract of employment was thus interfered with, but that the principle should be limited to contracts of employment; while the third held that the principle applied only where the contract was with one who was in the strict sense of the term a servant, and hence could have no application to such a contract as was here presented. The divergence of judicial opinion in this case was only a shadow, cast before, of the divergence of authority to follow. In England *Lumley v. Gye* was followed in a case the facts of which were similar,² and the reasoning of the court re-affirmed

⁷ See § 1326 *et seq.*

² *Bowen v. Hall*, 6 Q. B. D. 333.

¹ 2 El. & Bl. 216; 75 E. C. L. 216.

the broad principle that interference with a contract of any subject-matter might be a tort. This principle was thought by some authorities to be discarded by the House of Lords in *Allen v. Flood*,³ but in a case decided three years later,⁴ the House of Lords, while still dealing with contracts of employment, took the view that the principle involved was broad enough to apply to all contracts.

§1327. Contract of employment as servant.

If the contract is one of employment as a servant it is generally conceded that one who induces the servant to break the contract is liable in tort.¹ Cases of this sort are rare at Modern Law. The tort may not be uncommon, but litigation arising out of such tort is infrequent.

§1328. Contract of employment other than as servant.

If the contract is one of employment but not as servant in the strict sense of the term, we find a divergence of authority corresponding to that in *Lumley v. Gye*. The weight of modern authority is that one who induces another to break such a contract is liable to the party injured thereby.¹ This principle has been applied to contracts to sing in a theater,² to serve as laborer or cropper,³ to live with and care for a person in consideration of a certain weekly payment and a specified legacy,⁴ to act as selling agent on commission,⁵ or as general

³ (1898) A. C. 1; reversing *Flood v. Jackson* (1895), 2 Q. B. 21.

⁴ *Quinn v. Leatham* (1901), App. Cas. 495; affirming *Leatham v. Craig*, 2 Ir. Rep. (1899) 667.

¹ *Bixby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475.

² *Bowen v. Hall*, 6 Q. B. D. 333.

³ *Lumley v. Gye*, 2 El. & Bl. 216; 75 E. C. L. 216.

⁴ *Haskins v. Royster*, 70 N. C. 601; 16 Am. Rep. 780.

⁵ *May v. Wood*, 172 Mass. 11; 51 N. E. 191. (Breach was induced

by statements to the employer that the person performing the services was a dangerous person. The decision really was on a question of pleading, the majority of the court holding that the complaint was defective as not showing the statements substantially; while the minority held that the complaint was sufficient.)

⁵ *Raymond v. Yarrington*, 96 Tex. 443; 62 L. R. A. 962; 73 S. W. 800; reversing (Tex. Civ. App.), 69 S. W. 436. (The defendant who

superintendent of a manufacturing company,⁶ to work as mechanic in some manufacturing or mechanical business.⁷ In other cases, however, it has been held that if the contract is for employment, but not as servant, a third party who induces its breach is not liable in tort.⁸ This principle has been applied to a contract of employment as an actress.⁹

§1329. Contract other than employment.

In contracts other than those of employment we find a divergence even greater than in that class of cases. Some authorities hold that interference with any contract amounts to a tort.¹ This principle has been applied to contracts of sale,² whether the vendor,³ or the vendee,⁴ is induced to break the contract; to contracts to manufacture an article to order,⁵ and to contracts with a carrier of freight,⁶ or passengers.⁷ In other jurisdictions liability in tort for inducing a breach of contract is held not to exist in contracts outside of contracts of employment.⁸ Thus A leased rooms in a hotel to B. X induced A to break his contract and eject B. It was held that B had no

induced the employer first to limit plaintiff's territory and finally to dismiss him, had been in the same business, and had sold out his business to plaintiff, with an agreement not to compete.)

⁶ Chipley v. Atkinson, 23 Fla. 206; 11 Am. St. Rep. 367; 1 So. 934.

⁷ Walker v. Cronin, 107 Mass. 555.

⁸ Bourlier v. Macauley, 91 Ky. 135; 34 Am. St. Rep. 171; 11 L. R. A. 550; 15 S. W. 60.

⁹ Bourlier v. Macauley, 91 Ky. 135; 34 Am. St. Rep. 171; 11 L. R. A. 550; 15 S. W. 60. (Inducing Mary Anderson to break her contract to appear at plaintiff's theatre.)

¹ "The same reasons cover every case where one person maliciously persuades another to break any con-

tract with a third person. It is not confined to contracts for service." Jones v. Stanly, 76 N. C. 355, 356; quoted in Angle v. Ry., 151 U. S. 1, 15.

² Jackson v. Stanfield, 137 Ind. 592; 23 L. R. A. 588; 36 N. E. 345; 37 N. E. 14.

³ Green v. Button, 2 Crompt. M. & R. 707; Rice v. Manley, 66 N. Y. 82; 23 Am. Rep. 30.

⁴ Morgan v. Andrews, 107 Mich. 33; 64 N. W. 869.

⁵ Morgan v. Andrews, 107 Mich. 33; 64 N. W. 869.

⁶ Jones v. Stanly, 76 N. C. 355.

⁷ Nashville, etc., Ry. v. McConnell, 82 Fed. 65.

⁸ Boyson v. Thorn, 98 Cal. 578; 21 L. R. A. 233; 33 Pac. 492; Chambers v. Baldwin, 91 Ky. 121; 34 Am. St. Rep. 165; 11 L. R. A. 545; 15 S. W. 57.

right of action against X.⁹ So A agreed to sell tobacco to B. X induced A to sell this tobacco to X, knowing of A's contract with B. It was held that B could not recover from X.¹⁰ So A owed an account to B, an undertaker. All the undertakers in the city had agreed to serve no one who owed a bill to any member of their organization. A needed the services of an undertaker and applied to B, who refused him. He then applied to the other members of the association, each of whom refused him. It was held that A had no right of action against B.¹¹ A and B were engaged to be married. A's father X advised A to break the engagement and finally induced A to do so. It was held that B had no right of action against X for interference with contract; her only remedy being an action for slander if X had been guilty of that tort.¹² In some of the cases in which this doctrine has been announced, it may be doubted if the party whose liability in tort is sought to be enforced had committed any wrongful act. A had employed B for an indefinite term. X was A's foreman and had authority to discharge B. X quarreled with B; and instead of discharging B himself X appealed to A, and notified him that if he did not discharge B, X would not work for A longer. A discharged B. It was held that B had no right of action against X.¹³ Thus A had a contract with a railroad company B to haul sand and gravel which A was digging on land claimed by him, and was selling and shipping away. X claimed the same realty and notified B that he would hold him liable if he hauled such sand and gravel away. B broke his contract with A and refused to haul such sand and gravel. It was held that A had no right of action against X.¹⁴ In

⁹ *Boyson v. Thorn*, 98 Cal. 578; 21 L. R. A. 233; 33 Pac. 492.

¹⁰ *Chambers v. Baldwin*, 91 Ky. 121; 34 Am. St. Rep. 165; 11 L. R. A. 545; 15 S. W. 57.

¹¹ *Brewster v. Miller*, 101 Ky. 368; 38 L. R. A. 505; 41 S. W. 301.

¹² *Leonard v. Whetstone*, — Ind. App. —; 68 N. E. 197. For an action of slander in a somewhat simi-

lar case under a contract to bequeath property, see *May v. Wood*, 172 Mass. 11; 51 N. E. 191.

¹³ *Raycroft v. Tayntor*, 68 Vt. 219; 54 Am. St. Rep. 882; 33 L. R. A. 225; 35 Atl. 53.

¹⁴ *Glencoe, etc., Co. v. Commission Co.*, 138 Mo. 439; 60 Am. St. Rep. 560; 36 L. R. A. 804; 40 S. W. 93.

this case the court observed that the defendant corporation "had the undoubted legal right to protect its property interests in that manner," but at the same time the court further said that the doctrine of *Lumley v. Gye* was limited to interference between master and servant.

§1330. Wrongfully preventing performance.

In jurisdictions in which a party who induces another to break a contract is liable to the adversary party, his liability is still clearer if instead of inducing the breach, he does some wrongful act which makes performance impossible.¹ A had a contract with a railroad corporation B to construct a line of railroad, and was engaged in performing the contract. X, a rival company, bribed the officers of B to transfer to X all the stock of B, or put it under the control of X, and thus caused the general manager of B to withdraw the engineers of B from the work, without whom it could not proceed, and to give notices which caused A's tools and supplies to be seized and his workmen to be dispersed. A sued X; and it was held, on demurrer to A's petition, that he had stated a cause of action.² So A, a real estate broker, effected a contract for the sale of realty between B, the vendor, and X, the vendee, under a contract whereby A was to look to B for his commission. X refused to perform and made it impossible for B to perform the contract to sell the realty, and thus deprived A of his commission. It was held that A could maintain an action against X for the damages thus caused.³ In some jurisdictions, however, the right of the injured party to recover from the party outside the contract, who has made performance impossible by some wrongful act, is denied. Thus A had a contract to furnish B with electricity by means of B's wire,

¹ *Angle v. Ry.*, 151 U. S. 1.

² "If the Omaha company had by its wrongful conduct simply induced the Portage company to break its contract with Angle, it would have been liable to him for the damages sustained thereby. *A fortiori*

when it not only induces a breach of the contract by the Portage company, but also disables it from performance." *Angle v. Ry.*, 151 U. S. 1, 15.

³ *Livermore v. Crane*, 26 Wash. 529; 57 L. R. A. 401; 67 Pac. 221.

under a contract by which A was not to be liable in case of interruption of the current without A's fault. X cut the wire. It was held that B could not maintain an action against X for the damage caused by interruption of the current.⁴ It will be observed that this theory results in freeing X from all liability for the real injury done by his wrongful act; and in denying to B the right to recover from anyone—a result which tends to show some error in the process whereby it was reached. So where A had agreed to support B and X by its negligence disabled A, and made it practically impossible for him to perform, it was held that B had no cause of action against X.⁵ A, the owner of certain realty, leased it to B. X entered, and built a fence thereon, as a result of which B left and did not pay any rent. It was held that in the absence of fraud, A had not right of action against X.⁶

§1331. Interference with formation of future contract.

If no contract is in existence between A and B, and X interferes to prevent A from making contracts with B, some courts hold that B may recover from X for the damage thus caused. In the common class of cases B has some business or trade and X's wrongful act is looked upon as interfering therewith. Thus if X, an employer, threatens to discharge an employee A, if A trades with B, it has been held that B can maintain an action against X.¹ In other cases this right of action has been denied if the means used to prevent the formation of the contract was not itself a tort. Thus where a teacher persuaded pupils not to patronize a certain store, it was held that the owner of the store could not maintain an action against the teacher, even if such conduct was malicious.² So if an employer threatens to discharge employees if they deal at a certain store, it has been held, contrary to the authority

⁴ Byrd v. English, 117 Ga. 191; 43 S. E. 419.

⁵ Brink v. R. R., 160 Mo. 87; 53 L. R. A. 811; 60 S. W. 1058.

⁶ Walden v. Conn. 84 Ky. 312; 4 Am. St. Rep. 204; 1 S. W. 537.

¹ Graham v. R. R., 47 La. Ann. 214; 49 Am. St. Rep. 366; 27 L. R. A. 416; 16 So. 806.

² Guethler v. Altman, 26 Ind. App. 587; 84 Am. St. Rep. 313; 60 N. E. 355.

already discussed,³ that the owner of the store has no right of action against the employer.⁴ So it has been held that if X refuses to employ anyone who rents of A, and by reason thereof A is unable to rent his house, A has no right of action against X.⁵ So no injunction can be given against the action of competitors in cutting rates in order to break up a rival's business.⁶

III. INTERFERENCE BY COMBINATION.

§1332. Combination on different footing from individual.

If a combination of persons, acting in conspiracy, attempts to compel one person to break a contract with another, a question is presented which in some respects is different from that in which one person induces, or compels, a breach of contract; since threats made by a number of persons, or by one person who controls a number of persons, may involve consequences very different from threats made by a single person.¹ Probably, however, if *bona fide* persuasion alone were resorted to, the effect of persuasion by several acting in concert would not be substantially different as to its legal effect from persuasion by one. A combination of persons, to induce a breach of contract, usually, however, resorts to some form of compulsion when persuasion fails. At any rate the reported cases on this branch of the subject involve the idea of compulsion in general. Thus where a number of tailors stopped work and sent back in an unfinished condition the work on which they were engaged, knowing that under the circumstances it would be impossible for their employer to get men to finish it, such conduct was held to amount to a tort.²

³ See *ante*, this section.

⁴ *Payne v. Ry.*, 13 Lea (Tenn.), 507; 49 Am. Rep. 666.

⁵ *Heywood v. Tillson*, 75 Me. 225; 46 Am. Rep. 373.

⁶ *Passaic Print Works v. Dry-Goods Co.*, 105 Fed. 163; 62 L. R. A. 673; 44 C. C. A. 426.

¹ *Quinn v. Leatham* (1901), App. Cas. 495; affirming *Leatham v. Craig*, 2 Ir. Rep. (1899), 667.

² *Mapstrich v. Ramge*, 9 Neb. 390; 31 Am. Rep. 415; 2 N. W. 739.

§1333. Whether combination necessarily illegal.

It seems to have been held originally that a combination between workmen for the purpose of raising their wages, was necessarily illegal; no matter what means might be employed.¹ It was also held that a combination between employers for the purpose of keeping down wages, was illegal.² The rate of wages was probably selected by the court stating this view of the law, because, at the outset, the rate of wages was the chief thing in which the combination of employers and employees was concerned. The view that combinations of employees for the purpose of raising their wages, securing a better condition in hours of labor, circumstances of labor, and the like, is necessarily illegal, has long since been abandoned.³ If such combination resorts to means lawful *per se*, the combination is not necessarily illegal. It is very generally held that workmen may combine for the purpose of stopping work, at least as long as they do not break any existing contracts; and may refuse to resume work until their demands are complied with.⁴ Such conduct constitutes a strike, and is not necessarily illegal.

§1334. Rights of employee whose discharge is caused by combination.

The nature and extent of the liability of striking workmen, or others who have entered into a combination to compel a

¹ *Rex v. Mawbey*, 6 T. R. 619; *Hilton v. Eckersley*, 6 El. & Bl. 47.

² *Hilton v. Eckersley*, 6 El. & Bl. 47.

³ *Farrer v. Close*, L. R. 4 Q. B. 602; *Hornby v. Close*, L. R. 2 Q. B. 153; *Arthur v. Oakes*, 63 Fed. 310; 25 L. R. A. 414; 11 C. C. A. 209; *Snow v. Wheeler*, 113 Mass. 179; *Commonwealth v. Hunt*, 4 Met. (Mass.) 111; 38 Am. Dec. 346; *Longshore Printing Co. v. Howell*, 26 Or. 527; 46 Am. St. Rep. 640; 98 L. R. A. 464; 38 Pac. 547.

⁴ *Wabash Ry. v. Hannahan*, 121

Fed. 563; *Arthur v. Oakes*, 63 Fed. 310; 25 L. R. A. 414; 11 C. C. A. 209. "Strikes are not necessarily illegal. A strike is properly defined as 'a simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend on the means by which it is enforced and its objects." *Farrer v. Close*, L. R. 4 Q. B. 602, 612; quoted in *Longshore Printing Co. v. Howell*, 26 Or. 527, 542; 46 Am. St. Rep. 640; 28 L. R. A. 464; 38 Pac. 547.

given course of action on the part of another, depends in part upon the relation to the transaction of the party seeking relief. An action against the parties to such a combination is often brought by an employe whose discharge is demanded. The weight of authority is that an employe under a contract, who is discharged by his employer, not for any fault of such employe, but because his other workmen refuse to work for him unless such employe is discharged, may have an action for damages against the persons thus causing his discharge.¹ The case of *Allen v. Flood*,² has been thought to modify this rule at English law. In a recent case, however,³ *Allen v. Flood* has been explained and shown to be not necessarily opposed to this rule. In *Allen v. Flood* certain shipwrights were hired by the job, their employer being free to discharge them at any time. Some of the iron-workers in the shipyard refused to work with these shipwrights, because the shipwrights had in the past, while working for another employer, done certain iron work. Allen, a delegate of the iron workers, notified the employers that the iron workers would be called out, or would knock off work, the evidence being conflicting on this point, unless the shipwrights were discharged. Accordingly, they were discharged. They then brought suit against Allen. It was held by a divided court that they could not recover. The subsequent case referred to⁴ points out that it did not appear in *Allen v. Flood*, that Allen had any authority to cause a strike, and that as far as the record showed he did

¹ *Read v. Friendly Society of Operative Stonemasons* (1902), 2 K. B. 732; *Perkins v. Pendleton*, 90 Me. 166; 60 Am. St. Rep. 252; 38 Atl. 96; *Lucke v. Clothing Cutters*, etc., Assembly, 77 Md. 396; 39 Am. St. Rep. 421; 19 L. R. A. 408; 26 Atl. 505. "The defendants did knowingly and for their own ends induce the commission of an actionable wrong, and they employed illegal means to bring it about. Such conduct would be actionable in an individual and in-

capable of justification. *a fortiori* where the defendants acted in concert." *Read v. Friendly Society of Operative Stonemasons* (1902), 2 K. B. 732, 738.

² (1898) A. C. 1; reversing *Flood v. Jackson* (1895), 2 Q. B. 21.

³ *Quinn v. Leathem* (1901), App. Cas. 495; affirming *Leathem v. Craig*, 2 Ir. Rep. (1899) 667.

⁴ *Quinn v. Leathem* (1901), App. Cas. 495; affirming *Leathem v. Craig*, 2 Ir. Rep. (1899) 667.

nothing more than to communicate to the employer the conceded fact that some of the men at least were not willing to continue work while these shipwrights were employed. In other cases, however, it has been held that conduct of union men in refusing to work with non-union men, and thus prevent the latter from obtaining employment, was not a wrongful act, and accordingly an injunction against such conduct has been refused where no further element of wrong was shown to exist.⁵ Where this last doctrine is recognized, emphasis is laid upon the right of every man to choose such associates in work as he pleases, especially in view of the fact that every employee assumes the risk of injury from the negligence of his fellow employes. Two points distinguish *National Protective Association v. Cummings*⁶ from the cases in which the employees are held to be guilty of a tort in striking to cause the discharge of another employee. (1) The real trouble was between rival labor unions. The strike may be, therefore, held to be merely a protective measure, and to come under the doctrine of competition.⁷ (2) The union whose members refused to work, required an examination as to qualifications for work as a condition precedent to admission. Considerable importance is attached to this fact in the opinion of the court, as showing that the union men were unwilling to assume the risk of working with men outside of their union, whose efficiency had not been thus tested.

§1335. Injunction to prevent injury to business.

The action may be brought by the employer whose business is threatened. The threatened strike, or boycott, may be in-

⁵ *National Protective Union v. Cumming*, 170 N. Y. 315; 88 Am. St. Rep. 648; 58 L. R. A. 135; 63 N. E. 369. (Three judges dissenting.) (Distinguishing *Curran v. Galen*, 152 N. Y. 33; 57 Am. St. Rep. 496; 37 L. R. A. 802; 46 N. E. 297, as a case in which the discharge was caused by threats and use of false reports.) The same view was expressed in *Jersey City*

Printing Co. v. Cassidy, 63 N. J. Eq. 759; 53 Atl. 230, where the employer sought an injunction while the right to strike to cause of discharge of non-union men was recognized, injunction was granted, as violence was employed.

⁶ 170 N. Y. 315; 88 Am. St. Rep. 648; 58 L. R. A. 135; 63 N. E. 369.

⁷ See §§ 1325, 1331.

tended to compel him to acquiesce in certain arrangements for remuneration, hours of labor, and the like; or to compel him to employ only members of the union, and in this last case the employer is occasionally in no way really involved, since the real conflict is between rival unions, although the employer is likely to be one of the real victims. The remedy of injunction is often sought in such cases, as if it can be obtained it is the most efficient remedy for preventing a wreck of business. No injunction can be given against a mere strike, if peaceable and not connected with a boycott.¹ Injunction has, however, been granted restraining employes from interfering with the performance of a contract on the part of their employer, though such interference was peaceable, where the employes did not quit work in good faith.² Whether an injunction can be given against a systematic attempt to induce other persons to refrain from future business relations with the party seeking relief, as long as no violence is used, is a question upon which there is some conflict of authority. In some states it is held that an injunction will be given,³ or that such conduct is criminal.⁴ In other states such conduct is held to be a mere exercise of the employees' right of free speech in telling of their grievances; and such conduct will not be enjoined.⁵ If actual violence exists or is threatened, a different principle applies. An injunction will be given against strikers who use violence to prevent other workmen from taking their places with their former employer.⁶ A method often employed by strikers is

¹ *Wabash Ry. v. Hannahan*, 121 Fed. 563.

² *In re Lennon*, 166 U. S. 548.

³ *Beck v. Protective Union*, 118 Mich. 497; 74 Am. St. Rep. 421; 42 L. R. A. 407; 77 N. W. 13; *Barr v. Trades' Council*, 53 N. J. Eq. 101, 111; 30 Atl. 881, 884; *Martin v. McFall*, — N. J. Eq. —; 55 Atl. 465; *Longshore Printing Co. v. Howell*, 26 Or. 527; 46 Am. St. Rep. 640; 28 L. R. A. 464; 38 Pac. 547; *Erdman v. Mitchell*, 207 Pa. St. 79; 63 L. R. A. 534; 56 Atl. 327.

⁴ *State v. Gliden*, 55 Conn. 46; 3 Am. St. Rep. 23; 8 Atl. 890.

⁵ *Marx, etc., Co. v. Watson*, 168 Mo. 133; 90 Am. St. Rep. 440; 56 L. R. A. 951; 67 S. W. 391; *Atkins v. Fletcher Co.*, — N. J. Eq. —; 55 Atl. 1074.

⁶ *Taff Vale Ry. v. Amalgamated Society of Railway Servants* (1901), A. C. 426; *Underhill v. Murphy*, — Ky. —; 78 S. W. 482; *Vegelahn v. Gunter*, 167 Mass. 92; 57 Am. St. Rep. 443; 35 L. R. A. 772; 44 N. E. 1077; *Beck v. Protective Union*,

what is known as "picketing," which consists in stationing persons to meet at points where they can intercept the new workmen of the employers, and observe who continue work. If violence exists as a result of such picketing,⁷ whether violence of the strikers,⁸ or violence of those in sympathy with them,⁹ which the officers of the strikers do not restrain,¹⁰ an injunction will be given. It has been held that no actual force need be used if there is an apparent display of force,¹¹ since threats may be implied as well as expressed,¹² and that if the new workmen are unwilling to stop to discuss questions of their continuing in employment with the pickets or strikers, the act of the strikers in insisting on continuing such discussion is such annoyance as will be enjoined. So strikers will be enjoined from taking up the time of the new workmen during the hours of their employment, to discuss with them the question of their quitting work.¹³ Whether, if none of these acts are found to exist, an injunction can be given against picketing, is a question upon which there is some conflict of authority. In some states it has been held that a peaceful picketing is the only available method by which the strikers can state their grievances, use arguments to induce others to

118 Mich. 497; 74 Am. St. Rep. 421; 42 L. R. A. 407; 77 N. W. 13; *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo. 212; 52 Am. St. Rep. 622; 32 S. W. 1106; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; 53 Atl. 230.

⁷ *Allis-Chalmers Co. v. Reliable Lodge*, 111 Fed. 264; *Southern Ry. v. Machinists' Local Union*, 111 Fed. 49; *Vegelahn v. Gunter*, 167 Mass. 92; 57 Am. St. Rep. 443; 35 L. R. A. 772; 44 N. E. 1077; *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo. 212; 52 Am. St. Rep. 622; 32 S. W. 1106; *Murdock v. Walker*, 152 Pa. St. 595; 34 Am. St. Rep. 678; 25 Atl. 492.

⁸ See cases cited in the preceding note.

⁹ *Southern Ry. v. Machinists' Local Union*, 111 Fed. 49.

¹⁰ *Union Pacific Ry. v. Ruef*, 120 Fed. 102.

¹¹ *Otis Steel Co. v. Iron Molders' Union*, 110 Fed. 698; *Beck v. Protective Union*, 118 Mich. 497; 74 Am. St. Rep. 421; 42 L. R. A. 407; 77 N. W. 13; *O'Neil v. Behanna*, 182 Pa. St. 236; 61 Am. St. Rep. 702; 38 L. R. A. 382; 37 Atl. 843.

¹² "Threats in language are not the only threats recognized by the law. Covert and unspoken threats may be just as effective as spoken threats." *Beck v. Protective Union*, 118 Mich. 497, 519; 74 Am. St. Rep. 421; 42 L. R. A. 407; 77 N. W. 13.

¹³ *O'Neil v. Behanna*, 182 Pa. St. 236; 61 Am. St. Rep. 702; 38 L. R. A. 382; 37 Atl. 843.

co-operate with them, and that this is accordingly a mere exercise of the right of free speech. Where such view is taken, peaceful picketing is not enjoined.¹⁴ In other jurisdictions it is held that every person has a right to have labor flow freely to him, and that an organized effort to prevent this is a wrong against which he may have an injunction. Where this view is taken, even peaceable picketing will be enjoined. Accordingly, some courts seem to take the view that a threat of strike, and a boycott without any threat of violence, but merely stating that the employer will be left off the fair list, will be enjoined, since such threat ultimately involves the violence which the court looks upon as the necessary concomitant of a strike, and interruption of business which is necessarily involved in a boycott.¹⁵ Associations of employes may also be enjoined from ordering,¹⁶ or soliciting,¹⁷ employes under contract to break their contracts.

§1336. Other forms of relief.

The doctrine that relief of some sort will be given against a combination seeking to cause the breach of a contract, or interfere with a trade or business, is not limited to cases where relief is sought by an employe whose discharge is demanded or caused, nor to injunctions to prevent injury to business. While these are the commonest forms of injury and are therefore the cases most frequently presented for adjudication, they do not limit the doctrine. In a recent English case, *A*, a butcher, had employed nonunion men. *X*, a retail seller of meat, had been taking fine meat from *A*, though without any

¹⁴ See obiter in *Union Pacific Ry. v. Ruef*, 120 Fed. 102.

¹⁵ *Plant v. Woods*, 176 Mass. 492; 79 Am. St. Rep. 330; 51 L. R. A. 339; 57 N. E. 1011. (See the dissenting opinion in this case for a statement of the opposite doctrine.) *Gray v. Trades' Council*, — Minn. —; 63 L. R. A. 753; 97 N. W. 663.

¹⁶ *Taff Vale Ry. v. Amalgamated Society of Railway Servants* (1901), App. Cas. 426.

¹⁷ *Southern Ry. v. Machinists' Local Union*, 111 Fed. 49; *Vegelehn v. Gunter*, 167 Mass. 92; 57 Am. St. Rep. 443; 35 L. R. A. 772; 44 N. E. 1077.

binding contract in advance to take it. The union demanded that A employ only union men. On A's refusal the union demanded that X refuse to deal with A, and ordered X's men to strike if X continued to buy meat from A. X accordingly discontinued his dealings with A. It was held that A could recover damages against the persons who by such threats induced X to discontinue his dealings with A.¹ X, a trades-union committee, tried to compel the builders of a certain town to obey certain rules. A declined. X then tried to induce those who supplied A with material to refuse to continue to do so. B, one of such material men, declined to do this. X then induced Y, who had a contract with B to furnish material, to break such contract and refuse performance. B brought an action against X for damages. It was held that he could recover.² An employer whose apprentices are under a contract not to join labor unions, may have an injunction against representatives of a union who, knowing of such a contract, seek to induce the apprentices to break their contract and join a union.³ An injunction has been granted on the application of a vendee, to enjoin striking employes of the vendor from preventing the vendor from performing his contract of sale. Thus a mining corporation A sold all its product of coal to a coal company B, which made contracts of sale to others in reliance on obtaining coal from A. By the terms of the contract A was not liable for failure to deliver, if caused by strikes. A strike in which strikers prevented other persons from working for A, prevented A from delivering coal. It was held that B could enjoin the strikers from interfering with A's business and preventing A from delivering coal to B.⁴

¹ *Quinn v. Leathem* (1901), App. 128; 85 Am. St. Rep. 779; 54 L. R. Cas. 495; affirming *Leathem v. A.* 640; 48 Atl. 894.
Craig, 2 Ir. Rep. (1899) 667.

² *Temperton v. Russell* (1893), 1 Q. B. 715.

³ *Flaccus v. Smith*, 199 Pa. St.

⁴ *Chesapeake, etc., Co. v. Coke Co.*, 119 Fed. 942; *Carroll v. Coal Agency Co.*, 124 Fed. 305.

§1337. Interference by voluntary association.

So-called voluntary associations are often found, the members of which agree not to deal with those who are not members of their association; or, in some cases, of an allied association. Such associations generally enforce discipline by means of fines or threats of expulsion. Whether a non-member, whose business is wrecked by his being excluded from or voluntarily remaining out of such association can have any relief against such association, is a question upon which there is a conflict of authority. In some states, especial stress is laid on the right of any man or any number of men, acting singly or in combination, to deal only with such persons as they may please. "It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has already been said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly and make simultaneous declaration of their choice."¹ It is held that one who is not a member of a voluntary association of dealers in live stock who had a rule not to recognize any yard trader unless a member, and to expel members who dealt with those who are not members, cannot have an injunction against such association, although his business is wrecked because practically all the persons with whom he can do business are in such association and will not deal with him.² So, a retail lumber association agreed not to buy of any wholesale dealer who should sell to any customers or dealers not members of such association at any point where a member of such association did business. A, a wholesale dealer, sold at such a

¹ Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 234; 40 Am. St. Rep. 319; 21 L. R. A. 337; 55 N. W. 1119.

² Dounes v. Bennett, 63 Kan. 653; 88 Am. St. Rep. 256; 55 L. R. A. 560; 66 Pac. 623.

point to one outside the association. B, the secretary of the association, demanded that A pay into the treasury of the association ten per cent of the amount received from such sales; and on A's refusal so to do, B declared his intention of notifying the members of the association of A's conduct. A sued for an injunction. It was held that none should be given.³ A was a master plumber not a member of the local association nor of the national association, of which the local association was a branch. The national association had passed a resolution that none of its members would buy material from any firm selling to any persons other than master plumbers, which by construction was held to mean master plumbers in the association. A sued to enjoin the local association from using this resolution to prevent firms from selling material to A. The injunction was refused.⁴ In other states, however, it has been held that the conduct of such voluntary associations is unlawful if it is intended to wreck the business of others by inducing third persons to cease dealing with such others.⁵ A combination of persons for the purpose of causing a malicious injury to another by running his business is held to be actionable at Common Law as well as by statute.⁶ Thus it has been held that a druggist who was not a member of the druggists' association of a certain city, could have an injunction to prevent the association restraining or from sending circulars out to wholesale dealers notifying them that if they continued to deal with plaintiff the druggists' association would not buy from them.⁷ It has been suggested in argument that a distinction should be made between cases where the association attempts to influence the action of its own members only, and those where the association attempts

³ Bohn Mfg. Co. v. Hollis, 54 Minn. 223; 40 Am. St. Rep. 319; 21 L. R. A. 337; 55 N. W. 1119.

⁴ Macauley v. Tierney, 19 R. I. 255; 61 Am. St. Rep. 770; 37 L. R. A. 455; 33 Atl. 1. (The doctrine of competition was invoked as the ground for refusing such injunction. Bohn Mfg. Co. v. Hol-

lis, *supra*, was cited and followed.)

⁵ Martell v. White, — Mass. —; 64 L. R. A. 260; 69 N. E. 1085.

⁶ State *ex rel.* Durner v. Huegin, 110 Wis. 189; 62 L. R. A. 700; 85 N. W. 1046.

⁷ Brown v. Pharmacy Co., 115 Ga. 429; 90 Am. St. Rep. 126; 57 L. R. A. 547; 41 S. E. 553.

to influence the conduct of those outside of the association.⁸ This distinction has, however, been repudiated on the ground that the system of fines and expulsions amounts to coercion: and that no logical distinction can be drawn between coercion of those outside of an association, and coercion of a minority of the members of an association by the majority.⁹ Thus an association of granite manufacturers, including practically all those in that business with whom A could have dealings, made a rule that they would not sell to or deal with persons not members of their association. The association notified A, who owned the plant for polishing granite, that he could not do any polishing until he joined the association. They did not try to affect the conduct of any not members of the association, but a system of fines compelled the members of the association to comply with the resolutions passed by the majority. It was held that A could recover actual damages from those persons who had by passing and enforcing such resolution, wrecked his business.¹⁰ It has also been held that an action for damages would lie at Common Law against a combination of wholesalers who agreed to sell to or deal with certain retailers only.¹¹ It has been suggested that in order to make such combinations unlawful, so that a third person may have a right of action against the combination or the members thereof, the action of the combination must be malicious. Thus a combination of cattle dealers who refused to sell to A, a butcher, and induced a third person to refuse to deal with A, was held actionable if malicious, otherwise not.¹² This distinction is open to the criticism that if "malice" means personal ill will, or a desire to injure, this rule makes motive the controlling factor, instead of the doing of a wrongful act, followed by damage caused thereby; while if "malice" means the doing of a wrongful act without just excuse, the rule begs

⁸ See argument in *Boutwell v. Marr*, 71 Vt. 1; 76 Am. St. Rep. 746; 43 L. R. A. 803; 42 Atl. 607, as discussed in opinion of the court.

⁹ *Boutwell v. Marr*, 71 Vt. 1; 76 Am. St. Rep. 746; 43 L. R. A. 803; 42 Atl. 607.

¹⁰ *Boutwell v. Marr*, 71 Vt. 1; 76

Am. St. Rep. 746; 43 L. R. A. 803; 42 Atl. 607.

¹¹ *Hawarden v. Coal Co.*, 111 Wis. 545; 87 N. W. 472.

¹² *Delz v. Winfree*, 80 Tex. 400; 26 Am. St. Rep. 755; 16 S. W. 111.

the entire question, as the point to be determined is whether any wrongful act has been done, and whether any just excuse exists. If the article whose sale is contracted for is one in which a legal monopoly exists, such as a proprietary or a patent medicine, it has been held that a contract entered into with a retail druggists' association, requiring the proprietor not to sell to "cut-rate" druggists, is not an unlawful interference with the business of a "cut-rate" druggist.¹³

§1338. Blacklisting.

Questions which are the converse of those presented in strikes* exist where employers combine to prevent certain workmen from obtaining employment. This often takes the form known as the "blacklist." It has been held that an employe who by reason of having taken part in a strike has been blacklisted, cannot have an injunction against the employers to prevent them from continuing to act in conspiracy not to employ such employe.¹ The existence of any civil remedy has been denied.² Some cases are presented in which employers will not accept an employe unless he has a certificate or clearance card from his last employer. Such last employer is, even under such circumstances, under no obligation at Common Law to furnish such certificate.³ Hence if such employe is refused employment for want of such certificate he cannot maintain an action against his former employer for refusal to give such certificate.⁴ Where the former employer assigns a reason for

¹³ *Park & Sons Co. v. Druggists' Association*, 175 N. Y. 1; 96 Am. St. Rep. 578; 67 N. E. 136.

¹ *Worthington v. Waring*, 157 Mass. 421; 34 Am. St. Rep. 294; 20 L. R. A. 342; 32 N. E. 744. (The court declined to express any opinion as to whether he had a remedy at Common Law; but said that if he had any it was by indictment.)

² *Boyer v. Telegraph Co.*, 124 Fed. 246.

³ *Cleveland, etc., Ry. v. Jenkins*,

174 Ill. 398; 66 Am. St. Rep. 296; 62 L. R. A. 922; 51 N. E. 811.

⁴ *New York, etc., R. R. v. Schaffer*, 65 O. S. 414; 87 Am. St. Rep. 628; 62 L. R. A. 931; 62 N. E. 1036. (In this case it was pointed out by one of the court that the record failed to show any agreement between the former employer and the employer refusing employe not to hire former employes without such certificate.)

the discharge of the employe, and such reason is entered upon the employer's records or transferred to the certificate given to such employe at his request, the action of the employe is often based on the theory that such former employer is liable for slander or libel if such assigned reason is false. It has been held that if the entry on the employer's books is false and prevents the employe from obtaining employment, such employe may maintain an action against such employer.⁵ In other cases there seems to be a tendency to hold that entries, made for the benefit and sole use of the employer, and transferred to the certificate at the request of the employe are not actionable unless malicious. Thus entering the ground of discharge as "carelessness," on the discharge list of a railway for its own use is not actionable unless malicious.⁶ Publication is often lacking; and hence neither libel nor slander can exist. Thus the entry on employe's record "Dismissed — insolent and abusive to company's patrons" was read by one clerk to another, who copied it on a card. It was signed by the employer's superintendent and given to the employe. All this was done because of his request for his record. No other publication was shown, and from the evidence it was at least very probable that the alleged ground of discharge was true. It was held not libel.⁷ Even if it has been shown that the agreement between employers not to accept former employes of each other is the cause of the employe's being refused employment, or being discharged, it has been held that no action will lie against any of such employers. Two insurance companies, B and X, entered into an agreement not to employ any one who had worked for the other within two years from the termination of his former employment. A had worked for X, had been discharged, and had been employed by B under a contract for an indefinite term. When B and X made their contract, B

⁵ *Hundley v. R. R.*, 105 Ky. 162; 88 Am. St. Rep. 298; 48 S. W. 429. (This is part obiter, since the declaration was held to be demurrable, as it did not show that by reason of such false entry plaintiff had

been unable to obtain employment.)

⁶ *Missouri Pacific Ry. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794; 4 L. R. A. 280; 11 S. W. 555.

⁷ *Hebner v. Ry.*, 78 Minn. 289; 79 Am. St. Rep. 387; 80 N. W. 1128.

discharged A. A had, of course, no remedy against B for breach of contract; and it was held that in tort A could recover neither against B,⁸ nor against X.⁹ The reason advanced for this rule is that such contract between the insurance companies is illegal, hence not binding; hence the failure to secure employment is in law due to the voluntary and rightful act of the employer.¹⁰ While such reasoning is rather artificial, Kentucky is a state in which procuring breach of a contract of employment is not actionable.¹¹

⁸ *Baker v. Ins. Co. (Ky.)*, 64 S. W. 913.

¹⁰ *Trimble v. Ins. Co. (Ky.)*, 64 S. W. 915.

⁹ *Trimble v. Ins. Co. (Ky.)*, 64 S. W. 915.

¹¹ See § 1328.

PART VII.

DISCHARGE.

CHAPTER LXII.

NEW CONTRACT.

§1339. New contract as discharge.

An executory contract may be discharged by a new contract entered into for that purpose between the parties thereto.¹ Thus if the parties to a building contract enter into a new contract whereby the original contract is modified, the contractor can recover more than the original contract price if he has done more work than was originally contracted for.² So if the builder under instructions from the architect departs from the plans, the owner of the building cannot on that account make a deduction from the contract price.³ No action can in such cases be maintained on the original contract.⁴ Thus if a written contract is modified by subsequent oral agreement, an action must be brought upon the contract as modified.⁵ An

¹Smith v. Salt Lake City, 83 Fed. 784; Mylin v. King, 139 Ala. 319; 35 So. 998; Stewart, etc., Co. v. Krambs, 139 Cal. 316; 73 Pac. 854; Hutchinson v. Coonley, 209 Ill. 437; 70 N. E. 686; Chicago, etc., Ry. v. Moran, 187 Ill. 316; 58 N. E. 335; Smith v. Trust Co., 97 Ia. 117; 66 N. W. 84; Brunswick v. Chemical Co., 110 La. 214; 34 So. 417; Youngberg v. Lamberton, — Minn. —; 97 N. W. 571; McCreery v. Day, 119 N. Y. 1; 16 Am. St. Rep. 793; 6 L. R. A. 503; 23 N. E. 198; Good v. Smith, — Or. —; 76 Pac. 354; Murphy v. Bank, 184 Pa. St. 208; 39 Atl. 143; Flegel v. Hoover, 156 Pa. St. 276; 27 Atl. 162; Fitzgerald v.

Walsh, 107 Wis. 92; 81 Am. St. Rep. 824; 82 N. W. 717.

²Smith v. Salt Lake City, 83 Fed. 784; Chicago, etc., Ry. v. Moran, 187 Ill. 316; 58 N. E. 335; Murphy v. Bank, 184 Pa. St. 208; 39 Atl. 143; Fitzgerald v. Walsh, 107 Wis. 92; 81 Am. St. Rep. 824; 82 N. W. 717.

³Smith v. Trust Co., 97 Ia. 117; 66 N. W. 84.

⁴Hayes v. Orr, 47 Fed. 286; Pittsburgh, etc., R. R. v. Smith, 26 O. S. 124.

⁵Iroquois Furnace Co. v. Hardware Co., 201 Ill. 297; 66 N. E. 237.

action can not be brought upon the original contract,⁶ even if the new contract is broken,⁷ still less if it is performed.⁸ The new contract may abrogate the earlier contract either expressly or by implication. The modification may be implied from the conduct of the parties.⁹ Thus A agreed to buy a share in certain property to be purchased. Before completing the purchase he gave notice that he withdrew, and the adversary party secured another subscriber for A's share. This was held to amount to an implied rescission of A's contract by consent.¹⁰ If an insurance company issues a policy containing certain grounds of forfeiture when it knows of the existence of one of such grounds, such clause of forfeiture is thereby waived.¹¹ Thus a course of dealing with the agent of an insurance company may waive a provision requiring payment of premiums as a condition precedent to liability.¹² A provision in a policy requiring proof of loss to be submitted in a certain time is waived by the act of the insurance company in agreeing to pay such loss, thereby causing the insured to delay submitting such proofs.¹³ The question of waiver of provisions in insurance policies is often complicated with questions of the authority of the agent by whom such alleged waiver is made. If he has no authority to waive such provision the insurance

⁶ *Herreshoff v. Misch*, 21 R. I. 524; 45 Atl. 145.

⁷ *Sioux City Stock Yards Co. v. Packing Co.*, 110 Ia. 396; 81 N. W. 712; *Napa Valley Wine Co. v. Daubner*, 63 Minn. 112; 65 N. W. 143.

⁸ *Lost Lake Lumber Co. v. Smith*, 29 Wash. 713; 70 Pac. 134.

⁹ *Sutton v. Griebel*, 118 Ia. 78; 91 N. W. 825; *Evans v. Jacobitz*, 67 Kan. 249; 72 Pac. 848.

¹⁰ *Sutton v. Griebel*, 118 Ia. 78; 91 N. W. 825.

¹¹ *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304; *German Mutual Ins. Co. v. Niewedde*, 11 Ind. App. 624; 39 N. E. 534; *Baldwin v. Ins. Co.*, 107 Ky. 356; 92 Am. St. Rep. 362; 54 S. W. 13;

Wright v. Fire Insurance Co., 12 Mont. 474; 19 L. R. A. 211; 31 Pac. 87; *German Ins. Co. v. Shader*, 1 Neb. Unofficial 704; 60 L. R. A. 918; 96 N. W. 604; *Hanover Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719; 67 N. W. 774; *Arthur v. Ins. Co.*, 35 Or. 27; 76 Am. St. Rep. 450; 57 Pac. 62; *Aetna Ins. Co. v. Holcomb*, 89 Tex. 404; 34 S. W. 915; *McQuillan v. Life Association*, 112 Wis. 665; 88 Am. St. Rep. 986; 56 L. R. A. 233; 87 N. W. 1069; 88 N. W. 925.

¹² *Baldwin v. Ins. Co.*, 107 Ky. 356; 92 Am. St. Rep. 362; 54 S. W. 13.

¹³ *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330; 7 L. R. A. 81; 12 S. W.

company is not bound by his acts.¹⁴ Thus under a provision that concurrent insurance should avoid a policy unless the agent indorsed such permission thereon in writing only, the knowledge of such agent that other insurance exists does not waive such provision of the policy.¹⁵ If the new contract abrogates the earlier contract by express terms, no question of the intention of the parties can usually arise.¹⁶ A subsequent contract which does not by express terms abrogate an earlier contract will, nevertheless operate as a discharge thereof if it is inconsistent with such earlier contract.¹⁷ To operate as a discharge in the absence of an express agreement to that effect, the new contract must be clearly inconsistent with the continued existence of the original contract. A sold a blacksmith shop to B, and agreed, as a part of the consideration, not to engage in that business in that town. The fact that A and B subsequently formed a partnership in such business, did not as a matter of law discharge such contract absolutely. Accordingly, if, after the termination of such partnership, A continues such business, he is liable upon his covenant.¹⁸ A subsequent agreement between a contractor and a sub-contractor, whereby the contractor finishes the work for the sub-contractor, and agrees to pay him any balance over and above the cost of completing such work, does not operate as a complete discharge by

668. So *Thompson v. Ins. Co.*, 136 U. S. 287.

¹⁴ *Northern Assurance Co. v. Building Association*, 183 U. S. 308.

¹⁵ *Northern Assurance Co. v. Building Association*, 183 U. S. 308.

¹⁶ *Green v. Ry.*, 92 Fed. 873; 35 C. C. A. 68; *Sheats v. Scott*, 133 Ala. 642; 32 So. 573; *Arnold v. Pawtucket*, 21 R. I. 15; 41 Atl. 576.

¹⁷ *Fox v. Tyler*, 109 Fed. 258; 48 C. C. A. 356; *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. 385; *Kirklin v. Loan Association*, 107 Ga. 313; 33 S. E. 83; *Holt v. Silver*,

169 Mass. 435; 48 N. E. 837; *Robinson v. Ry.*, 84 Mich. 658; 48 N. W. 205; *Fitzhugh v. Harrison*, 75 Minn. 481; 78 N. W. 95; *Frank v. Cobban*, 20 Mont. 168; 50 Pac. 423; *Nebraska National Bank v. Clark*, 58 Neb. 183; 78 N. W. 527; *Hall v. Eccles*, 46 Neb. 880; 65 N. W. 1058; *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545; 59 N. E. 357; *Green v. Paul*, 155 Pa. St. 126; 25 Atl. 867; *Sherman v. Sweeny*, 29 Wash. 321; 69 Pac. 1117; *Hogan v. Peterson*, 8 Wyo. 49; 59 Pac. 162.

¹⁸ *Drown v. Forrest*, 63 Vt. 557; 14 L. R. A. 80; 22 Atl. 612.

abandonment of the original contract.¹⁹ Discharge by a new contract does not affect the liabilities of either party to the contract to third parties. If A enters into a contract with B, whereby B agrees to construct certain buildings, or do certain work for A, and A and B subsequently discharge such contract by mutual agreement, A does not thereby incur any liability to persons having sub-contracts with B.²⁰

§1340. To what extent new contract operates as discharge.

A question frequently presented for decision is to what extent does the later contract abrogate the earlier contract. If the later contract expressly abrogates the earlier contract, it abrogates it *in toto* unless some restriction is made in the later contract, preventing such total abrogation.¹ If the later contract does not expressly abrogate the earlier *in toto*, but is inconsistent therewith, the scope of the later contract determines whether any part of the earlier contract is in force. If the later contract between the parties covers the same subject-matter and has the same scope as the earlier contract, but is in whole or in part inconsistent therewith, the later contract abrogates the earlier contract *in toto* and is the only contract upon the subject between the parties.² Thus an oral agreement to convey or devise land, even if otherwise enforceable is avoided by the promisee's accepting a subsequent lease of such land, in-

¹⁹ Pease v. McQuillin, 180 Mass. 135; 61 N. E. 819.

²⁰ Peake v. New Orleans, 139 U. S. 342; School District v. Thomas, 51 Neb. 740; 71 N. W. 731.

¹ Union, etc., Co. v. Johnson, 72 Fed. 147; 18 C. C. A. 490; De Baumont v. Webster, 71 Fed. 226; Hutchinson v. Holmes Sanitarium, 93 Wis. 23; 66 N. W. 700.

² Patmore v. Colburn, 1 Crompt. M. & R. 65; Penman Mfg. Co. v. Broadhead, 21 Can. S. C. 713; Housekeeper Publishing Company v. Swift, 97 Fed. 290; 38 C. C. A. 187; Bourn v. Dowdell (Cal.), 50 Pac. 695;

Harrison v. Polar Star Lodge, 116 Ill. 279; 5 N. E. 543; Stow v. Russell, 36 Ill. 18; McDonough v. Kane, 75 Ind. 181; Paul v. Meservey, 58 Me. 419; Howard v. Railroad Co., 1 Gill (Md.) 311; Tuggles v. Callison, 143 Mo. 527; 45 S. W. 291; Chrisman v. Hodges, 75 Mo. 413; McCreery v. Day, 119 N. Y. 1; 16 Am. St. Rep. 793; 6 L. R. A. 503; 23 N. E. 198; Renard v. Sampson, 12 N. Y. 561; Spreckel v. Bender, 30 Or. 577; 48 Pac. 418; Burke v. Purifoy, 21 Tex. Civ. App. 202; 50 S. W. 1089.

consistent with his rights under such contract.³ An option to buy the fee is not as a matter of law, however, surrendered by taking a lease upon such realty.⁴ A agreed with B, a street railway company, to construct iron work and appliances for certain curves, at a certain rate per foot. Subsequently, by mutual agreement, the parties changed the weight of the iron to be used, and modified the specifications so as to make one curve where there had before been three. The distance was thus lengthened. It was held that in the absence of an express agreement to the effect that the same price per foot was to be paid, that such contract abrogated the original contract as to the rate per foot which A was to receive.⁵ A contract between a municipal corporation and a street railway company by which a certain rate of fare to be charged by a railway company is agreed upon, and the railway company assumes a liability for paving a certain place along its tracks, for which it was not before liable, and agrees to charge but one fare for transportation over its whole line, whereas, before it was entitled to charge in some cases more than one fare, abrogates the original contract between such railway company and city, fixing the rate of fare and reserving to the city the right to make subsequent changes in such rates.⁶ A contract for the sale of a certain number of tons of cotton seed at a certain price, is abrogated by a new contract between the parties for the sale of a less number of tons at an increased price.⁷ If a new contract is entered into between the parties, upon the same subject-matter, as an alleged prior contract, it has been held that the protest of one of the parties, claiming rights under such alleged prior contract, does not prevent the new contract from abrogating the earlier one.⁸ So if a contract is rescinded when

³ *Harmon v. Harmon*, 51 Fed. 113; *Unger v. Unger*, 65 O. S. 495; 63 N. E. 67.

⁴ *Wade v. Oil Co.*, 45 W. Va. 380; 32 S. E. 169.

⁵ *Marshall, etc., Co. v. Traction Co.*, 138 Pa. St. 266; 22 Atl. 23.

⁶ *Cleveland City Ry. v. Cleveland*, 94 Fed. 385.

⁷ *Consumers' Cotton-Oil Co. v. Ashburn*, 81 Fed. 331. (The new contract was made after the vendor had repudiated his original contract to sell at a lower price.)

⁸ *United States v. Lamont*, 155 U. S. 303.

only partly performed, and a new contract entered into to pay for the work done, such contract abrogates a provision of the earlier contract as to the time of payment.⁹ A new contract for construction abrogates a provision in a prior contract providing that the engineer's decision upon certain matters should be final.¹⁰ However, a subsequent contract modifying only the grade of work to be done has been held to leave in full force such a provision as to the power of the engineer.¹¹ If the new contract covers a subject-matter which is only in part the same as that covered by the old contract, the new contract abrogates the old only in so far as it is inconsistent therewith.¹² Modifications in a building contract do not abrogate it entirely, as long as the alterations and changes leave it possible to follow the original contract.¹³ A contract for erecting a mill provided that the foundations should be laid in cement and mortar, except the foundations for machinery which should be laid in Portland cement. The walls were to be laid in lime mortar, except certain cappings which were to be in Portland cement. A subsequent modification of the contract substituted Louisville cement for Portland cement in all the brick work except the machinery foundations and the cappings. It was held that this change referred only to the kind of cement to be used, and did not affect the contract as to the amount of brick which was to be laid in cement.¹⁴ A contract providing for making certain changes in the construction of a furnace, does not abrogate an earlier contract between the same parties, whereby one agrees to sell such furnace to the other.¹⁵ A

⁹ South End Improvement Co. v. Harden (N. J. Eq.), 52 Atl. 1127.

¹⁰ Chicago, etc., Ry. v. Moran, 187 Ill. 316; 58 N. E. 335; affirming 85 Ill. App. 543; Galveston v. Devlin, 84 Tex. 319; 19 S. W. 395.

¹¹ McCauley v. Keller, 130 Pa. St. 53; 17 Am. St. Rep. 758; 18 Atl. 607.

¹² Alferitz v. Ingalls, 83 Fed. 964; Welch v. Allington, 23 Cal. 322; Crary v. Bowers, 20 Cal. 86; Griffith v. Grogan, 12 Cal. 317; Mc-

Dale v. Kingsley, 163 Ill. 433; 45 N. E. 281; North v. Mallory, 94 Md. 305; 51 Atl. 89; Perkins Oil Co. v. Eberhart, 107 Tenn. 409; 64 S. W. 760; Pike v. Pike, 69 Vt. 535; 38 Atl. 265.

¹³ Hood v. Smiley, 5 Wyom. 70; 36 Pac. 856.

¹⁴ Perkins Oil Co. v. Eberhart, 107 Tenn. 409; 64 S. W. 760.

¹⁵ Uhlig v. Barnum, 43 Neb. 584; 61 N. W. 749.

agreed to make a machine for B, according to certain plans and specifications. There was no guaranty that the machine would do the work for which it was intended. Subsequently, the parties found that some of the plans and specifications were imperfect, and A agreed to examine the drawings and specifications and correct them if there was anything imperfect or defective therein. It was held that the new agreement did not amount to a warranty that the machine would do the work for which it was made.¹⁶ A contract in writing for grading a street, in which the employer reserves the right to decide how much work is to be done, and to stop the work at any time, is not abrogated by a subsequent request by the employer that the contractor should increase his working force to such number of men as could complete the grading within a certain time. The employer may subsequently exercise his right to stop the work.¹⁷ B bought A's poultry and grocery business, and A agreed not to engage in the poultry business while B remained therein. Subsequently, A bought some real estate and B's poultry business, and B agreed not to engage in the poultry business in a certain territory for a specified time. It was held, that the latter contract did not merge the earlier one.¹⁸ An author and publisher made a contract, fixing the quality of the books to be published, and the price therefor. A subsequent oral modification as to the first edition will not abrogate the written contract as to subsequent editions.¹⁹ Two contracts, of different dates, which are not inconsistent each with the other, and one of which appears to be in part performance of the other, are to be enforced together. The second does not abrogate the first.²⁰ A modification which merely extends the time for performance leaves the remaining provisions in full force.²¹ In order to operate as a discharge or modification of an earlier contract, the new contract must appear to have been

¹⁶ *Johnson v. Freemann*, 160 Pa. St. 317; 28 Atl. 780.

¹⁷ *Beers v. Town Site Co.*, 97 Wis. 212; 72 N. W. 870.

¹⁸ *Adams v. Adams*, 160 Ind. 61; 66 N. E. 153.

¹⁹ *Keely v. Hartranft*, 178 Pa. St. 384; 35 Atl. 984.

²⁰ *Rhoades v. Ry.*, 49 W. Va. 494; 55 L. R. A. 170; 39 S. E. 209.

²¹ *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40; 23 N. E. 598.

so intended. A new contract of equal degree with an earlier one, and upon the same subject-matter, will not abrogate or merge the earlier contract, if the parties make an express agreement that it shall not so operate.²² So a new contract intended to confirm and ratify a prior contract cannot operate as a discharge thereof.²³ So a building contract is not abrogated by the owner's making payments direct to the laborers and material men, with the consent of the contractor.²⁴ As far as the later contract is inconsistent with the earlier contract, however, it thereby abrogates and supersedes it.²⁵ A employed B for a term of years for a compensation, which was to be a certain per cent of the profits. B was not to draw out his profits unless with A's consent. Subsequently, B assigned to X the amount of the profits belonging to B for the first year, and A assented thereto, and promised to pay such amount to X. Such new contract was held to abrogate that part of the original contract, giving A the option to retain such profits in the business until the end of the contract and the right to set off against such profits any damage for B's subsequent violation of the contract.²⁶ A sold B land for a certain sum down and the balance due in three installments. B was to have the option of avoiding the contract before the first installment became due and forfeiting the amount paid down. Subsequently A extended the time for paying the first installment. This was held to extend the time within which B could avoid the sale.²⁷

§1341. New contract must be enforceable.—Mutual assent necessary.

The proposition that a prior contract may be modified or abrogated by a subsequent contract implies that such subse-

²² *Alferitz v. Ingalls*, 83 Fed. 964.

²³ *Lowell v. Washington County R. R.*, 90 Me. 80; 37 Atl. 869.

²⁴ *Lane v. Hardware Co.*, 121 Ala. 296; 25 So. 809.

²⁵ *Ross v. Barry*, 19 Can. S. C. 360; *American, etc., Co. v. Ry.*, 47 Fed. 343; *Bray v. Loomer*, 61 Conn.

456; 23 Atl. 831; *Chandler v. Knott*, 86 Ia. 113; 53 N. W. 88; *Gray v. Barge*, 47 Minn. 498; 50 N. W. 1014.

²⁶ *Grosse v. Sweet*, 188 Ill. 555; 59 N. E. 432; affirming 80 Ill. App. 418.

²⁷ *Thayer v. Allison*, 109 Ill. 180.

quent contract must have the elements necessary to the formation of a valid original contract. The new contract requires the assent of all the parties to the original contract or of their successors in interest to operate as a discharge thereof.¹ One party cannot modify the contract unless the other assents thereto.² A contract between A and B cannot be modified by A's declaration of his wish to avoid the contract and the promise of B's agent to try to induce B to consent thereto.³ So a contract between A and B cannot be abrogated or modified by a subsequent contract between B and C to which A does not assent.⁴ Thus an agreement between A and B to divide the profits to be received from the sale of certain lands cannot be modified by an agreement between B and C whereby C agrees that B shall have any bonus which may be paid upon a particular transaction with respect to certain lands included by the contract between A and B.⁵ So a promise by a construction company to pay the salary of the president of a railway company will not discharge the railway company from liability to its president unless the latter assents to such new contract.⁶ So an agreement between A, B and C cannot be modified to C's prejudice by a subsequent agreement between A and B.⁷ It has been held that a modification by A and B which does not increase C's liability cannot be invoked by C as a discharge of his original liability.⁸ So a contract between a father and his son for the support of the father cannot be modified after the father becomes insane

¹ *Utley v. Donaldson*, 94 U. S. 29; *Brown v. Lumber Co.*, 117 N. C. 287; 23 S. E. 253; *Dickinson v. Plow Co.*, 101 Wis. 157; 76 N. W. 1108.

² *Central Coal and Coke Co. v. Good*, 120 Fed. 793; *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140; 94 Am. St. Rep. 112; 59 L. R. A. 122; 42 S. E. 378; *Dickinson v. Plow Co.*, 101 Wis. 157; 76 N. W. 1108.

³ *McCormick, etc., Co. v. Markert*, 107 Ia. 340; 78 N. W. 33.

⁴ *Currier v. Kretzinger*, 162 Ill.

511; 44 N. E. 882; *McKay v. Myers*, 168 Mass. 312; 47 N. E. 98; *Ludlow v. Strong*, 53 N. J. Eq. 326; 31 Atl. 409; *Bowen v. Ry.*, 34 S. C. 217; 13 S. E. 421.

⁵ *Currier v. Kretzinger*, 162 Ill. 511; 44 N. E. 882.

⁶ *Bowen v. Ry.*, 34 S. C. 217; 13 S. E. 421.

⁷ *Ehrman v. Rosenthal*, 117 Cal. 491; 49 Pac. 460.

⁸ *Gibbons v. Grinsel*, 79 Wis. 365; 48 N. W. 255.

by an agreement between the son and the other children,⁹ though it can of course be modified by a contract made between father and son while the father has still capacity to contract.¹⁰ If A and B have entered into a contract for C's benefit, they may modify or abrogate such contract at any time before C has assented thereto,¹¹ but they cannot modify it thereafter.¹² To abrogate,¹³ or modify¹⁴ a prior contract, it is necessary that the minds of the parties to the original contract should meet by offer and acceptance upon the terms of the new contract. Thus mere negotiations, consisting of unaccepted offers cannot affect a prior contract.¹⁵ So mere statements by one party to a contract made after the contract is entered into cannot modify or abrogate it if not assented to by the adversary party.¹⁶ Thus a subsequent conversation between the parties to a written contract had immediately after signing it, whereby they discuss and construe it, does not of itself affect the contract, since the parties had no intention of modifying it by such conversation.¹⁷ So a notice by one party to a contract of a change desired or insisted on by him does not amount to a modification unless the adversary party assents thereto either expressly or impliedly. Thus a notice by an employer, to an employee, with whom he has an unexpired contract, of a reduction in the contract rate is without effect if the employee does not assent thereto.¹⁸ So a bill of lading sent to a consignee after an oral agreement for shipping goods has been

⁹ *Hudson v. Hudson*, 90 Ga. 581; 16 S. E. 349; *Hudson v. Hudson*, 87 Ga. 678; 27 Am. St. Rep. 270; 13 S. E. 583.

¹⁰ *Hudson v. Hudson*, 90 Ga. 581; 16 S. E. 349.

¹¹ *Jordan v. Laverty*, 53 N. J. L. 15; 20 Atl. 832.

¹² See § 1308.

¹³ *Hamilton v. State* (Miss.), 8 So. 761; *Gottstein v. Lumber Co.*, 7 Wash. 424; 35 Pac. 133.

¹⁴ *Stix v. Roulston*, 88 Ga. 743; 15 S. E. 823.

¹⁵ *Bellamy v. Debenham*, L. R. 45

Ch. D. 481; *Mt. Holly, etc., Co. v. Caraleigh, etc., Works*, 72 Fed. 244; 18 C. C. A. 535; *Globe Refining Co. v. Guano Co.*, 112 Ga. 366; 37 S. E. 379; *Hamilton v. State* (Miss.), 8 So. 761.

¹⁶ *Aurora Water Co. v. Aurora*, 129 Mo. 540; 31 S. W. 946; *Wolff Dryer Co. v. Bigler*, 192 Pa. St. 466; 43 Atl. 1092; *Stacy v. Rose* (Tenn. Ch. App.), 58 S. W. 1087.

¹⁷ *Dean v. Mfg. Co.*, 177 Mass. 137; 58 N. E. 162.

¹⁸ *Kendrick v. Visage*, 88 Ga. 275; 14 S. E. 612.

entered into between himself and the carrier cannot limit the carrier's liability.¹⁹ So a contract for the sale of goods cannot be changed to a consignment or agency for sale by a provision in an invoice subsequently forwarded to the purchaser even though he does not actively dissent therefrom.²⁰ So, A sold an elevator to B who bought for C. Subsequently B wrote to A that he did not expect to be called to pay for the elevator until C paid B. A did not dissent and thereafter put the elevator in place. It was held that A's silence did not amount to an acceptance of B's request, even if the elevator was put in after the time fixed by the original contract.²¹ A new contract which is intended to be executed by both parties to the original contract, and the creditors of one of such parties, does not operate as a discharge of the prior contract where not executed by such creditors.²² General authority by some promoters of a corporation to others to do whatever the latter think best abrogates a prior contract that they would retain a controlling interest in the stock of such corporation and not sell their shares without first offering them to their associates where, in order to secure the co-operation of others, without which such corporation could not be organized, it is necessary to let them have a controlling interest in such corporation.²³

§1342. Recognition of breach not new contract.

The recognition of the fact of a breach by the adversary party followed by conduct consistent with the fact of such breach, which looks to the mitigation of damages arising therefrom does not amount to an abrogation of the contract. Thus an employe's accepting other work from one member of a firm on breach of a contract of employment made with such firm,¹

¹⁹ St. Louis, etc., Ry. v. Milk Co., 175 Ill. 557; 67 Am. St. Rep. 238; 51 N. E. 911.

²⁰ John S. Brittain Dry-Goods Co. v. Birkenfeld, 20 Mont. 347; 51 Pac. 263.

²¹ C. & C. Electric Motor Co. v.

Frisbie Co., 66 Conn. 67; 33 Atl. 604.

²² Banewur v. Levenson, 171 Mass. 1; 50 N. E. 10.

²³ Smith & Co. v. Bierce, 104 La. 96; 28 So. 905.

¹ Nickerson v. Russell, 172 Mass. 584; 53 N. E. 141.

does not abrogate such contract. So if a buyer does not perform the contract of sale, the fact that the vendor resells on the vendee's account,² and that he acts under the vendee's instructions in making such resale,³ does not abrogate the contract of sale. So if A breaks a contract into which he has entered with B, B's unaccepted offer to release A from liability on certain terms does not operate as a discharge of such contract.⁴

§1343. Effect of invalidity of new contract.

A later contract which is invalid and unenforceable does not abrogate an earlier contract though it was intended so to do. If the second contract is voidable as by reason of duress,¹ and the second contract is avoided by reason of such defect, it will not operate to abrogate or modify the earlier contract. So if the second contract is voidable because it is entered into with an unauthorized agent of the adversary party,² it will not, if avoided on that ground, abrogate or modify the earlier contract. A public contract which by statute must be let to the lowest bidder on advertisement for bids, cannot be modified in a substantial element after it has once been let.³ So if a later contract is unenforceable because of the Statute of Frauds it cannot, if attacked on that ground, abrogate or modify an earlier contract.⁴

§1344. New contract must have consideration.

In order to operate as a discharge in whole or in part of an earlier contract, the later contract must be supported by a valuable consideration. If the original contract is still executory

² Doty v. Nixon, 109 Mich. 266; 67 N. W. 116.

³ Grist v. Williams, 111 N. C. 53; 32 Am. St. Rep. 782; 15 S. E. 889.

⁴ Sheffield Furnace Co. v. Coke Co., 101 Ala. 446; 14 So. 672; Spinning v. Drake, 4 Wash. 285; 30 Pac. 82; 31 Pac. 319.

¹ Weatherford v. McCrocklin (Ky.), 34 S. W. 24.

² Mt. Holly, etc., Co. v. Caraleigh,

etc., Works, 72 Fed. 244; 18 C. C. A. 535; Campau v. Detroit, 106 Mich. 414; 64 N. W. 336; Rowland Lumber Co. v. Ross, 100 Va. 275; 40 S. E. 922; Skobis v. Ferge, 102 Wis. 122; 78 N. W. 426.

³ Campau v. Detroit, 106 Mich. 414; 64 N. W. 336.

⁴ Harvey v. Morey, 22 Colo. 412; 45 Pac. 383.

on both sides either in whole or in part, and the parties in forming the new contract waive, or release any liability created by the original contract such waiver or release is a consideration for the promise of the party whose liability is thus released.¹ Thus the assumption of personal liability where none before existed,² or a waiver of a right of a sub-contractor to complete the contract himself or to hire some one other than the chief contractor to complete it,³ is a consideration for a modification. If an executory contract between A and B is modified by imposing a new liability upon A without releasing him from any liability, and without imposing any additional liability upon B, such promise does not contain in itself any consideration sufficient to support A's promise to assume such new liability. Unless some consideration exists outside of the mutual promises of A and B, the new contract has no consideration and is unenforceable.⁴ After a written agreement is made for the sale of land, a subsequent agreement of the vendee to repay the amount received if a certain railroad was not completed in two years, is without consideration.⁵ A street car company, in order to obtain the consent of another company to use the tracks of the latter, agreed to reconstruct that part of the line which they desired to use, and equip it for use as an electric line. A subsequent agreement by which the company seeking to make use of such line, agreed, in addition to its former liability, to pay the costs incident to widen-

¹ Pioneer Savings & Loan Co. v. Nonnemacher (Ala.), 30 So. 79; Badders v. Davis, 88 Ala. 367; 6 So. 834; Carter v. Rhodes, 135 Cal. 46; 66 Pac. 985; Jones v. Haines, 117 Ia. 80; 90 N. W. 518; Pease v. McQuillin, 180 Mass. 135; 61 N. E. 819; Thomas v. Barnes, 156 Mass. 581; 31 N. E. 683; Bowman v. Wright, 65 Neb. 661; 91 N. W. 580; affirmed on rehearing. 65 Neb. 666; 92 N. W. 580; Bryant v. Thesing, 46 Neb. 244; 64 N. W. 967; Dyer v. Irrigation District, 25 Wash. 80; 64 Pac. 1009; Long v. Pierce Coun-

ty, 22 Wash. 330; 61 Pac. 142; Brown v. Everhard, 52 Wis. 205; 8 N. W. 725.

² Carter v. Rhodes, 135 Cal. 46; 66 Pac. 985.

³ Pease v. McQuillin, 180 Mass. 135; 61 N. E. 819.

⁴ Main Street, etc., Ry. Co. v. Traction Co., 129 Cal. 301; 61 Pac. 937; Pence v. Adams, 116 Ia. 462; 89 N. W. 1065; McIntyre v. Mining Co., 20 Utah 323; 60 Pac. 552.

⁵ Pence v. Adams, 116 Ia. 462; 89 N. W. 1065.

ing the track at the option of the other party, was without consideration.⁶ So a modification of a prior contract which relieves A from some liability imposed by such prior contract, without imposing any liability upon A in place thereof and without modifying B's liability in any way, is of no effect as a discharge of such prior contract.⁷ A promise made after a contract is entered into, to extend the time of performance, is without consideration and unenforceable.⁸ If the parties to a written contract fail to express their agreement in the terms thereof, and they execute a new contract to express their real intent, such contract needs no other consideration.⁹ If a contract has been performed on one side in full, a modification of the executory part of such contract whereby the original liability of the party who is still to perform remains unmodified but an additional liability is imposed upon him, is invalid unless a new consideration supports such new promise.¹⁰ So if a written contract of sale contains a warranty a subsequent oral warranty is unenforceable unless supported by a valuable consideration.¹¹

§1345. Formalities necessary to execution of new contract.—
Original contract under seal.

The formality with which a new contract modifying or abrogating an earlier contract must be executed, or the kind of evidence by which it must be proved, depends in part upon the formality with which the original contract is executed, or the evidence whereby it must be proved. At Modern Law a contract of record such as a judgment may be discharged by a subsequent contract taken in satisfaction thereof.¹ At Common Law, if the original contract was under seal, it could not, before breach, be modified by a subsequent executory agree-

⁶ Main St., etc., Ry. v. Traction Co., 129 Cal. 301; 61 Pac. 937.

⁷ Arnold v. Scharbauer, 118 Fed. 1008.

⁸ McIntyre v. Mining Co., 20 Utah 323; 60 Pac. 552.

⁹ Bullock v. Johnson, 110 Ga. 486; 35 S. E. 703.

¹⁰ Rumely v. Emmons, 85 Mich. 511; 48 N. W. 636.

¹¹ Rumely v. Emmons, 85 Mich. 511; 48 N. W. 636.

ment not under seal.² This view is still entertained in some jurisdictions in the United States.³ Such a contract may be abrogated by a subsequent contract not under seal which has been fully performed.⁴ If the subsequent contract not under seal has been so far carried out that the parties cannot be restored to their position before entering into it, the original contract under seal is thereby abrogated or modified.⁵ In equity a contract under seal might be discharged or modified by a subsequent oral contract not under seal. Thus the time for the performance of a contract under seal may be extended by a subsequent oral contract.⁶ Where law and equity are both administered by the same court and often in the same action, the equity rule permitting the discharge of contracts under seal by subsequent oral executory contracts has been extended to actions at law.⁷ A leased a store building to B by a written lease of ten years, at forty-five hundred dollars a year. After the first year, A and B made an oral agreement that the rent was to

¹ *German Bank v. Iron Works*, — Ia. —; 99 N. W. 174.

² *Countess of Rutland's Case*, Coke, Pt. V. 25b; *Spence v. Healey*, 8 Exch. 668.

³ *Tischler v. Kurtz*, 35 Fla. 323; 17 So. 661; *West Chicago Street Ry. v. Morrison, etc., Co.*, 160 Ill. 288; 43 N. E. 393.

⁴ *McClay v. Gluck*, 41 Minn. 193; 42 N. W. 875; *McCreery v. Day*, 119 N. Y. 1; 16 Am. St. Rep. 793; 6 L. R. A. 503; 23 N. E. 198; *Bonsack Machine Co. v. Woodrum*, 88 Va. 512; 13 S. E. 994.

⁵ *Arbogast v. Mylius*, — W. Va. —; 46 S. E. 809.

⁶ *Von Syckel v. O'Hearn*, 50 N. J. Eq. 173; 24 Atl. 1024; *Bigelow v. Rommelt*, 24 N. J. Eq. 115; *Tompkins v. Tompkins*, 21 N. J. Eq. 338.

⁷ Thus in speaking of the Common-Law rule the court said: "The application of this rule often produced great inconvenience and injustice, and the rule itself has been

overlaid with distinctions invented by the judges of the Common-Law courts to escape or mitigate its rigor in particular cases. But in equity the form of the new agreement is not regarded, and under the recent blending of the jurisdictions of law and equity, and the right given by the modern rules of procedure in this country and in England to interpose equitable defenses in legal actions, the Common-Law rule has lost much of its former importance. . . . It is a necessary consequence of our changed system of procedure that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a covenant or decreeing its discharge, will now constitute a good equitable defense in an action on the covenant itself." *McCreery v. Day*, 119 N. Y. 1, 7; 16 Am. St. Rep. 793; 6 L. R. A. 503; 23 N. E. 198.

be reduced to thirty-five hundred dollars for three years. B paid his rent at that rate, and A gave receipts in full. It was held that the oral agreement was of no effect if A chose to avoid it, but that as to the time for which he had received such rent, and given receipts in full, the agreement was binding, and A could not subsequently recover the difference between the original rental and that fixed by the new agreement.⁸ If a sealed contract contains a provision that no part of such contract shall be sub-let, such provision may subsequently be waived orally.⁹ If a contract under seal has been entered into, the parties thereto may enter into a subsequent oral contract upon a different subject-matter collateral to the original sealed contract, and such new contract will be valid. Thus A and B entered into sealed contract, whereby A conveyed his interest in partnership property to B. It was subsequently discovered that certain property had been omitted from such instrument. A subsequent oral contract between A and B conveying such omitted property is valid.¹⁰

§1346. Original contract required by law to be in writing.

If the contract is in writing, but not under seal, the question of the formality with which a subsequent contract must be executed, or the means whereby it must be proved, depends upon which of the classes of contracts the original contract is. If the original contract is one which is required by law to be in writing, it can not of course be modified by a subsequent oral agreement, and remain a contract of that class. The question, then, is, whether the subsequent oral agreement is of no effect, or whether it reduces the contract from this class to that of oral contracts. If the contract is one which is required by statute to be in writing, and this statute is passed by the legislature for the protection of the public, such a contract can not be modified or waived by subsequent oral agreement.¹ The

⁸ McKenzie v. Harrison, 120 N. Y. 260; 17 Am. St. Rep. 638; 8 L. R. Mass. 223; 46 N. E. 627.
A. 257; 24 N. E. 458.

¹⁰ Luddington v. Goodnow, 168 Mass. 223; 46 N. E. 627.

⁹ Gannon v. Shepard, 156 Mass. 355; 31 N. E. 296.

¹ Malone v. Philadelphia, 147 Pa. St. 416; 23 Atl. 628.

fact that the contract contains an express provision for such a modification, does not make the modification valid in such cases.² If, however, the statute does not require the contract to be in writing, but merely requires that modifications of such contract shall be recorded, the adversary party to be contract is not prejudiced by the failure of the proper officer to record the modification. The new contract, therefore, even if not recorded, operated to modify or abrogate the earlier contract.³ If the contract is one which is required by the rules of Common Law or law merchant to be in writing, or if it is required by statute to be in writing, but the statute is not passed from motives of public policy, a subsequent oral modification or abrogation of such contract is valid if it has the elements of a valid contract. The effect of such new contract is to reduce the entire contract to an oral contract, or to a contract which is partly in writing and partly oral, or else to discharge the original contract entirely.

§1347. Original contract required by law to be proved by writing.

If the original contract is one which is required by law to be proved by writing, some courts hold that such a contract can not be modified by a subsequent oral executory contract.¹ In other jurisdictions, the validity of a subsequent oral modification of such a contract depends upon the part of the original contract which it affects. As we have seen before,² in many jurisdictions a memorandum under the statute of frauds need not show the consideration therefor, unless such consideration is an executory term of the contract. In such jurisdictions, an oral modification of a contract required by law to be proved by writing, is valid if it does not in any way affect the promise made by the party who is agreeing to do an act which brings the contract within such statute, but affects entirely the prom-

² *Malone v. Philadelphia*, 147 Pa. St. 416; 23 Atl. 628.

³ *Ede v. Knight*, 93 Cal. 159; 28 Pac. 860.

¹ *Reid v. Plate-Glass Co.*, 85 Fed. 193; 29 C. C. A. 110; *Burns v.*

Real Estate Co., 52 Minn. 31; 53 N. W. 1017; *Rucker v. Harrington*, 52 Mo. App. 481; *Sanborn v. Murphy*, 86 Tex. 437; 25 S. W. 610.

² See § 701 *et seq.*

ise of an adversary party, which is the consideration for such promise. Thus, a written oil and gas lease, to be extended from year to year as long as production continues, upon a payment of specified royalty, may subsequently be so modified by parol as to discharge the lessee from liability as to such royalty.³ A written contract for the sale of land, which provides for the time of payment, may be modified by a subsequent oral contract, changing the time for making such payments. Thus, if the oral contract provides for the payment of certain monthly installments, and the delivery of the deed when the purchase price is paid in full, a subsequent oral contract to accept the rest of the purchase money with interest on deferred payments at once, gives the vendee a right to a deed for the property upon tender of such amount.⁴ A right to cut and use timber, which is created by a written contract, may be waived by an oral agreement.⁵

§1348. Original contract merely in writing.

If the contract is one which is in writing, but is not required by law to be in writing, or to be proved by writing, such contract may be modified by a subsequent oral agreement, if such agreement contains within itself the elements of a valid contract.¹ Thus, where A agreed in writing to construct a boiler and engine in B's barge within a given time, such contract may be subsequently modified by an oral agreement between A and B, fixing the time at which such barge is to be delivered to A.² A written contract for the sale of a machine,

³ Crawford v. Gas Co., 183 Pa. St. 227; 38 Atl. 595.

⁴ Anderson v. Moore, 145 Ill. 61; 33 N. E. 848.

⁵ Lee v. Hawks, 68 Miss. 669; 13 L. R. A. 633; 9 So. 828.

¹ Teal v. Bilby, 123 U. S. 572; Hull v. Pitrat, 45 Fed. 94; Cumberland, etc., Co. v. Wheatley, 9 App. D. C. 334; Gunby v. Drew, — Fla. —; 34 So. 305; Robinson v. Hyer, 35 Fla. 544; 17 So. 745; Smith v. Kelley, 115 Mich. 411; 73 N. W. 385; Van Santvoord v. Smith,

79 Minn. 316; 82 N. W. 642; Strahl v. Grocer Co. (Neb.), 98 N. W. 1043; Bryant v. Thesing, 46 Neb. 244; 64 N. W. 967; Solomon v. Vallette, 152 N. Y. 147; 46 N. E. 324; Beatty v. Larzelere, 194 Pa. St. 605; 45 Atl. 653; Neff's Estate, 180 Pa. St. 98; 39 Atl. 830; Moore v. Carter, 146 Pa. St. 492; 23 Atl. 243; Dignan v. Spurr, 3 Wash. 309; 28 Pac. 529.

² Manistee Iron Works Co. v. Lumber Co., 92 Wis. 21; 65 N. W. 863.

to be paid for before delivery, may subsequently be modified by the oral agreement of the parties that the vendee shall have the right to make trial of such machine, and to return it if not satisfactory, followed by delivery to vendee of the machine without demanding payment therefor.³ A written agreement by A, an attorney, to manage litigation for B for two and one-half per cent of the amount recovered if the allowance by the viewers is final, and five per cent of the recovery if the case is appealed to the court for trial, may be modified after verdict is obtained in court by an agreement that if A prevents a new trial, and prevents a reduction of the verdict, he shall have everything above a certain sum; that if the verdict is reduced below such sum, and above another sum, A is to receive nothing; and that if the verdict is reduced below such latter sum, B is to take a new trial, and pay A ten per cent of the recovery upon the second trial.⁴ If a written contract is modified in part by a subsequent oral agreement, it is said, in some jurisdictions, to be reduced entirely to an oral contract.⁵ The oral agreement to modify the written contract must be made subsequently thereto. If entered into at substantially the same time, it is unenforceable by reason of the parol evidence rule. Thus if a written contract for building a house does not require the contractor to paper the walls, an oral agreement entered into at substantially the same time providing that the contractor shall paper the walls is unenforceable.⁶ A written contract which has been signed by all the parties thereto, may be modified by a subsequent written contract, agreed to by all the parties, but signed only by the party who surrenders a right or advantage which the original contract gave him.⁷ The courts which allow an oral contract to modify a prior written contract, hold, nevertheless, that proof of such new oral agreement must be clear.⁸

³ *McGregor v. Register Co.*, 86 Ga. 439; 12 S. E. 683.

⁴ *Beatty v. Larzelere*, 194 Pa. St. 605; 45 Atl. 653.

⁵ *Malone v. R. R.*, 157 Pa. St. 430; 27 Atl. 756.

⁶ *McGuinness v. Shannon*, 154 Mass. 86; 27 N. E. 881.

⁷ *Bray v. Loomer*, 61 Conn. 456; 23 Atl. 831.

⁸ *Boyes v. Ramsden*, 34 Or. 253; 55 Pac. 538; *Watson v. Janion*, 6 Or. 137; *Kent v. Kent* (Va.), 34 S. E. 32.

§1349. Effect of express prohibition of oral modification.

If the written contract contains an express provision that no change or modification thereof can be made, except by writing to be signed by one or both parties, the parties to such contract may, nevertheless, modify or abrogate it by subsequent oral agreement, since the oral agreement will operate as a waiver of the terms of the contract inconsistent therewith, including that term which requires subsequent modification to be in writing.¹ Questions of this sort are often presented in building contracts, where it is provided that modifications or contracts for extra work must be in writing, and subsequent oral agreements for extra work or modifications are held valid.² Unless waived, however, such a provision prevents recovery for extra work.³ A provision that no extra work shall be done without a written order from the architect and an express agreement as to the extra cost has no application to extra work ordered by the owner under a provision of the contract allowing him so to do.⁴ So a provision in a building contract that work cannot be sub-let without the written consent of the owner first had, may be waived by a subsequent oral agreement.⁵ A provision in a sub-contract for constructing a railroad that stone could be substituted for that specified only on the written consent of the engineer of the contractor may be waived by subsequent oral contract.⁶ The party for whose benefit such pro-

¹ *Fire Ins. Association v. Wickham*, 141 U. S. 564; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Foster v. McKeown*, 192 Ill. 339; 61 N. E. 514; *Copeland v. Hewett*, 96 Me. 525; 53 Atl. 36; *Pechner v. Ins. Co.*, 65 N. Y. 195.

² *Davis v. Badders*, 95 Ala. 348; 10 So. 422; *Chicago, etc., Ry. v. Moran*, 187 Ill. 316; 58 N. E. 335; *Michaud v. MacGregor*, 61 Minn. 198; 63 N. W. 479; *McLeod v. Genius*, 31 Neb. 1; 47 N. W. 473; *Crowley v. Guaranty Co.*, 29 Wash. 268; 69 Pac. 784.

³ *Heard v. Dooly County*, 101 Ga. 619; 28 S. E. 986; *Wortman v. Kleinschmidt*, 12 Mont. 316; 30 Pac. 280; *Coorsen v. Ziehl*, 103 Wis. 381; 79 N. W. 562.

⁴ *Cooper v. Hawley*, 60 N. J. L. 560; 38 Atl. 964.

⁵ *Gannon v. Shepard*, 156 Mass. 355; 31 N. E. 296; *Bartlett v. Stanchfield*, 148 Mass. 394; 2 L. R. A. 625; 19 N. E. 549.

⁶ *Chicago, etc., Ry. v. Moran*, 187 Ill. 316; 58 N. E. 335.

vision is inserted may modify or waive it.⁷ If the architect is authorized to modify the plans by a written order, he has no authority to order modifications orally.⁸ A provision that the architect has authority to modify plans only by written order has been held to be for the benefit of the owner alone, and hence subject to modification by him, without the consent of the contractor.⁹ In a recent case¹⁰ such provision has been held to be for the benefit of both owner and contractor, and to be modified only with the consent of both. So a provision in an insurance policy that certain provisions thereof could be modified only by writing indorsed on the policy may be modified by a subsequent oral contract.¹¹ The original view entertained by the courts was that such written provisions in insurance policies could not be waived by subsequent oral contracts.¹²

§1350. Statutory rule.

In some states it is provided by statute that a written contract can be modified only by a contract in writing, or by an executed oral agreement. Under such statute, an executory oral agreement, even if otherwise valid, cannot operate to modify a prior written contract.¹ Under such statutes there is a conflict of authority as to what constitutes an executed con-

⁷ *Copeland v. Hewett*, 96 Me. 525; 53 Atl. 36.

⁸ *Gibbs v. School District*, 195 Pa. St. 396; 46 Atl. 91.

⁹ *Consaul v. Sheldon*, 35 Neb. 247; 52 N. W. 1104; *De Mattos v. Jordan*, 15 Wash. 378; 46 Pac. 402.

¹⁰ *Northern Light Lodge v. Kennedy*, 7 N. D. 146; 73 N. W. 524. (Criticising the opinions in the cases in the previous note as obiter.)

¹¹ *Continental Ins. Co. v. Pearce*, 39 Kan. 396; 7 Am. St. Rep. 537; 18 Pac. 291; *Westchester, etc., Ins. Co. v. Earle*, 33 Mich. 143; *Pechner v. Ins. Co.*, 65 N. Y. 195; *American Central Ins. Co. v. McCrea*, 8 Lea (Tenn.) 513; 41 Am. Rep. 647. Provision against other insurance.

Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71; 16 C. C. A. 136; *Morrison v. Ins. Co.*, 69 Tex. 353; 5 Am. St. Rep. 63; 6 S. W. 605.

¹² *Carpenter v. Ins. Co.*, 16 Pet. (U. S.) 495.

¹ *Thompson v. Garner*, 104 Cal. 168; 45 Am. St. Rep. 81; 37 Pac. 900; *Benson v. Shotwell*, 103 Cal. 163; 37 Pac. 147; *Erenberg v. Peters*, 66 Cal. 114; 4 Pac. 1091; *Mettel v. Gales*, 12 S. D. 632; 82 N. W. 181. In *Mettel v. Gales*, 12 S. D. 632; 82 N. W. 181, this statutory rule is spoken of as Common Law doctrine, apparently on the theory that it is the same thing as the parol evidence rule.

tract. An agreement between an insurance company and a policy holder after a loss fixing the amount of the liability of the company, is not a "modification" of the policy within the meaning of the statute, forbidding executory oral modifications of written contracts.² On the other hand, a written contract for sinking a well provided that if four and a half inch piping were used the price should be fifteen hundred dollars; but if three inch piping had to be used the price should be nine hundred fifty dollars. Subsequently after four and a half inch piping could be and was used for the greater part of the distance, the parties agreed orally that three and a half inch piping should be used for the rest of the distance and that the price should be fifteen hundred dollars. Pipe of this size was put in, and more than nine hundred fifty dollars was paid. It was held that the contractor could not recover the balance as the contract was still executory.³

§1351. Novation.

If B is indebted to A and C is indebted to B, and by mutual agreement between A, B and C, C agrees to pay his indebtedness to A, B agrees to discharge his obligation to C and A agrees to discharge his obligation to B, the contracts discharging B and C are valid and supported by a valuable consideration. Such a contract is a contract of novation in the more limited sense. Under such a contract, B and C are discharged.¹ A may maintain an action against C,² and may enforce the obligation against C even in jurisdictions where a person for

² Stockton, etc., Works v. Ins. Co., 121 Cal. 167; 53 Pac. 565. The court also put their ground of decision in this case upon the fact that the new agreement was in part performance, since the insured had furnished proofs of loss under the contract.

³ Mettel v. Gales, 12 S. D. 632; 82 N. W. 181.

¹ Dillard v. Dillard, 118 Ga. 97;

44 S. E. 885; Schlicher v. Whyte, — N. J. Eq. —; 54 Atl. 1125; affirming without report. Schlicher v. Vogel, 61 N. J. Eq. 158; 47 Atl. 448; Munson v. Magee, 161 N. Y. 182; 55 N. E. 916; Union Central Life Ins. Co. v. Hoyer, 66 O. S. 344; 64 N. E. 435.

² Castle v. Persons, 117 Fed. 835; 54 C. C. A. 133.

whose benefit a contract is made cannot enforce it at law.³ Hence a subsequent attaching creditor of B's who attempts by garnishee process against C to enforce B's claim against C cannot recover as against A's claim.⁴ The simplest form of novation is here given, consisting of two original debts and three parties. It is of course perfectly possible that there may be several debts and a corresponding increase in the number of parties.⁵ A new promise from the substituted debtor and a release of the claim against the substituted debtor are essential elements of a novation.⁶ Hence, if B, the original debtor, keeps silent when C, the new promisor, makes a verbal agreement with the creditor A, because B is too sick to talk, no novation exists.⁷ C's consent is an essential element of the novation, either to discharge B from his liability to A,⁸ or to enable A to maintain an action against C.⁹ Hence, if B hires C and agrees that C shall be paid by receiving goods from the firm of A and B and C buys goods on credit from such firm, no novation exists if A has not assented to such arrangement and B must pay his obligation to the firm, and recover his indebtedness from C.¹⁰ The assent of the parties may be implied¹¹ as well as expressed. It is not necessary that the parties

³ *Griffin v. Cunningham*, 183 Mass. 505; 67 N. E. 660.

⁴ *Commercial National Bank v. Kirkwood*, 184 Ill. 139; 56 N. E. 405; affirming 85 Ill. App. 235.

⁵ *Henry v. Ritenour*, 31 Ind. 136; *Lester v. Bowman*, 39 Ia. 611; *Finan v. Babcock*, 58 Mich. 301; 25 N. W. 294.

⁶ *Pugh v. Barnes*, 108 Ala. 167; 19 So. 370; *Carpy v. Dowdell*, 131 Cal. 495; 63 Pac. 778; *Pimental v. Marques*, 109 Cal. 406; 42 Pac. 159; *Walker v. Wood*, 170 Ill. 463; 48 N. E. 919; *Kirchman v. Coal Co.*, 112 Ia. 668; 52 L. R. A. 318; 84 N. W. 939; *Darling v. Rutherford*, 125 Mich. 70; 83 N. W. 999; *Dean v. Ellis*, 108 Mich. 240; 65 N. W. 971; *Hanson v. Nelson*, 82 Minn.

220; 84 N. W. 742; *In re Lemerise*, 73 Vt. 304; 50 Atl. 1062; *Cook v. Durham*, 61 Wis. 15; 20 N. W. 670.

⁷ *Hanson v. Nelson*, 82 Minn. 220; 84 N. W. 742.

⁸ *Illinois, etc., Co. v. Wagon Co.*, 112 Fed. 737; 50 C. C. A. 504; *Carpy v. Dowdell*, 131 Cal. 495; 63 Pac. 778; *In re Lemerise*, 73 Vt. 304; 50 Atl. 1062.

⁹ *Darling v. Rutherford*, 125 Mich. 70; 83 N. W. 999.

¹⁰ *Kirchman v. Coal Co.*, 112 Ia. 668; 52 L. R. A. 318; 84 N. W. 939.

¹¹ *Whitney v. Ins. Co.*, 127 Cal. 464; 59 Pac. 897; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358.

should all assent to the transaction at the same moment. If A and B agree and notify C of their agreement and he subsequently assents thereto, the contract of novation is valid if C's assent is given while the agreement between A and B stands ready for C's acceptance, like an unrevoked offer.¹² The term novation is also used to indicate a contract between the same parties as a prior contract, intended as a discharge of such prior contract and as a substitution therefor. The questions presented under novation of this sort are those discussed under the title of new contract as discharge,¹³ and new contract as payment.¹⁴ No novation of this sort exists unless the parties intend the new contract as a satisfaction of the prior contract. Hence the mere acceptance of a note,¹⁵ or a receiver's certificate,¹⁶ is not such novation. So the mere acceptance of a new certificate of deposit from a banking partnership does not discharge the estate of a deceased partner from liability on a certificate of deposit issued when such partner was alive and a member of the firm.¹⁷

¹² McLaren v. Hutchinson, 22 Cal. 187; 83 Am. Dec. 59; Comley v. Dazian, 114 N. Y. 161; 21 N. E. 135.

¹³ See § 1339 *et seq.*

¹⁴ See § 1397 *et seq.*

¹⁵ Hughes v. Mattes, 104 La. 218; 28 So. 1006.

¹⁶ State Bank v. Sewing Machine Co., 99 Va. 411; 39 S. E. 141.

¹⁷ Henry v. Caruthers, 196 Ill. 136; 63 N. E. 629; affirming 95 Ill. App. 582; *In re Gardner's Estate*, 199 Pa. St. 524; 49 Atl. 346.

CHAPTER LXIII.

MERGER.

§1352. Nature of merger.

It was a well settled doctrine of Common Law that a contract between two parties was merged in a subsequent contract between the same parties, covering the same subject-matter whenever the second contract was of a higher nature than the first, and the creditor was not deprived of any pre-existing remedy by such merger. The great distinction at Common Law between contracts as to their nature or grade was between simple contracts which were of a lower grade, and formal contracts which were of a higher grade. Accordingly, the simple contract is always merged in a subsequent formal contract entered into between the same parties and covering the same subject-matter. Among the formal contracts the contract of record was of a higher nature than the contract under seal and the latter merged in the former. The distinguishing feature of merger is that it operates without any dependence on the intention of the parties that merger shall exist.

§1353. Merger in contract of record.

A judgment rendered in an action based on a prior judgment merges such judgment for most purposes.¹ A personal judgment rendered on a note merges the note and a former judgment rendered thereon, even if the second judgment is smaller than the first.² However, it is held not to merge the judgment on which it is based so as to destroy its priority over

¹ Gould v. Hayden, 63 Ind. 443; ² Price v. Bank, 62 Kan. 735; 84
Bertram v. Waterman, 18 Ia. 529. Am. St. Rep. 419; 64 Pac. 637.

other liens on the realty on which it has become a lien.³ So merger does not operate to destroy the security of a decree as a lien.⁴ A judgment,⁵ or other contract of record,⁶ merges the prior contract which is the subject-matter of such contract of record. Hence, assigning a note "without recourse" after judgment has been taken thereon, does not make the assignor a guarantor.⁷ This rule of course does not apply to a judgment void for want of jurisdiction.⁸ A judgment merges a cause of action so that the judgment may be barred by limitations and hence neither the judgment nor the cause of action can be enforced, even under circumstances which would have prevented limitations from running against the original cause of action.⁹ A judgment for a breach of contract merges the right of action on all items and claims growing out of such breach which could have been included in such action, even though not actually included.¹⁰ Hence, if several breaches of a contract exist a recovery on one breach merges the right of action for all the breaches.¹¹ Thus if a receiver sues on stock liability for less than the full amount due and recovers judgment for such amount, he cannot thereafter recover the residue.¹² A agreed to deliver lumber to B, and to perform such contract A purchased lumber from C. C made default and by reason

³ *Springs v. Pharr*, 131 N. C. 191; 92 Am. St. Rep. 775; 42 S. E. 590.

⁴ *Turner v. Stewart*, 51 W. Va. 493; 41 S. E. 924.

⁵ *National Foundry and Pipe Works v. Water Supply Co.*, 183 U. S. 216; affirming 105 Wis. 48; 81 N. W. 125; *Howell v. Goodrich*, 69 Ill. 556; *Remington Paper Co. v. Hudson*, 64 Kan. 43; 67 Pac. 636; *Aiken v. Robinson*, 108 La. 267; 32 So. 415; *Packham v. Ins. Co.*, 91 Md. 515; 80 Am. St. Rep. 461; 46 Atl. 1066; 50 L. R. A. 828; *Thompson v. Ellsworth*, 39 Mich. 719; *Traflet v. Ins. Co.*, 64 N. J. L. 387; 46 Atl. 204; *Young v. Farwell*, 165 N. Y. 341; 59 N. E. 143; *James v. Allen Co.*, 44 O. S. 226;

58 Am. Rep. 821; 6 N. E. 246.

⁶ *Berry v. Ry.*, 89 Me. 552; 36 Atl. 904.

⁷ *Redden v. Bank*, 66 Kan. 747; 71 Pac. 578.

⁸ *Kansas, etc., Ry. Co. v. Moon*, 66 Ark. 409; 50 S. W. 996; *Oil, etc., Co. v. Koen*, 64 O. S. 422; 60 N. E. 603.

⁹ *Smith v. Brown*, 99 N. Y. 377; 52 Am. Rep. 34.

¹⁰ *Willoughby v. Furnishing Co.*, 96 Me. 372; 52 Atl. 756.

¹¹ *L. Bucki, etc., Co. v. Lumber Co.*, 109 Fed. 411; 48 C. C. A. 455; *Cockley v. Brucker*, 54 O. S. 214; 44 N. E. 590.

¹² *De Weese v. Smith*, 97 Fed. 309.

thereof A made default in his contract. B recovered from A the difference between the contract price and the market price; and A recovered from C by a like measure of damages. Both judgments were paid. A then brought suit against C to recover the amount paid by A to B on such judgment. It was held that A could not recover.¹³ On the other hand, if the contract is a continuing one and is not discharged by the breach, a judgment for a prior breach does not merge a later one. Thus an award of damages by arbitration for breach of a contract not to engage in business is not a merger of such contract so as to prevent a subsequent action at law for a subsequent breach.¹⁴ Accordingly the effect of recovering judgment for a breach often turns on the question whether the contract is a continuing one or whether the breach has discharged it. By the weight of authority the discharge of an employe terminates the contract of employment and leaves only a right of action for the breach.¹⁵ Accordingly, the recovery of an installment of his salary prevents recovery of any further damages in a subsequent action.¹⁶ Where such contract is treated as continuing on the theory of constructive service, recovery of one installment of salary does not prevent subsequent recovery of installments thereafter due.¹⁷ Merger applies to decrees which are not personal judgments. A decree in foreclosure finding the amount due on the note secured by the mortgage merges the note.¹⁸ A foreclosure of a mortgage in which no attempt

¹³ *Barr v. Henderson*, 107 La. 323; 31 So. 762.

¹⁴ *Nelson v. Hiatt*, 38 Neb. 478; 56 N. W. 1029.

¹⁵ See § 1442.

¹⁶ *Beckham v. Drake*, 2 H. L. 579; *Archard v. Hornor*, 3 Car. & P. 349; *Alie v. Nadeau*, 93 Me. 282; 74 Am. St. Rep. 346; 44 Atl. 891; *Olmstead v. Bach*, 78 Md. 132; 44 Am. St. Rep. 273; 22 L. R. A. 74; 27 Atl. 501; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *James v. Allen County*, 44 O. S. 226; 58 Am. Rep. 821; 6 N. E. 246; *Allen v. Text-*

Book Co., 201 Pa. St. 579; 88 Am. St. Rep. 834; 51 Atl. 323; same case, but with controlling facts in doubt upon the record, *Allen v. Engineers' Co.*, 196 Pa. St. 512; 46 Atl. 899; *Willoughby v. Thomas*, 24 Gratt. (Va.) 521.

¹⁷ *Strauss v. Meertief*, 64 Ala. 299; 38 Am. Rep. 8; *McMullan v. Dickinson Co.*, 60 Minn. 156; 51 Am. St. Rep. 511; 27 L. R. A. 409; 62 N. W. 120; *Williams v. Luckett*, 77 Miss. 394; 26 So. 967.

¹⁸ *Brigel v. Creed*, 65 O. S. 40; 60 N. E. 991.

is sought to enforce the personal liability of the grantee who has assumed the mortgage debt, as a part of the purchase price of the property conveyed to him, does not, however, merge the contract of such mortgagee.¹⁹ The merger of a note in a judgment rendered thereon does not prevent the subsequent use of the note as evidence, as in an action in ejectment upon the trust deed securing it.²⁰ In order to operate as merger the judgment must be rendered in an action between the parties to the contract or their legal representatives. An unsatisfied judgment against one of two or more joint and several obligors is no bar to an action against the other.²¹ Under statutes which under certain specified circumstances make joint contracts joint and several in legal effect, a judgment against one or two or more joint contractors does not, if unsatisfied, merge the contract as to the others.²² To operate as a merger the judgment must be based on the contract as the cause of action. A judgment on an official bond for one term does not merge a bond given by the same official for another term, the cause of action on the latter being a different and distinct breach.²³ A judgment rendered in an action for wages earned does not merge a subsequent claim for damages for discharge.²⁴ A judgment in a cause of action based on a trust relation does not merge the cause of action so as to destroy the trust relation.²⁵ A judgment on a coupon for interest attached to a bond establishes the validity of the bond,²⁶ but does not merge the bond.

¹⁹ *Washington Life Ins. Co. v. Marshall*, 56 Minn. 250; 57 N. W. 658; *McRae v. Sullivan*, 56 Minn. 266; 57 N. W. 659.

²⁰ *Brown v. Schintz*, 203 Ill. 136; 67 N. E. 767.

²¹ *Booth v. Huff*, 116 Ga. 8; 94 Am. St. Rep. 98; 42 S. E. 381; *Giles v. Canary*, 99 Ind. 116; *Cornelle v. Pfeiffer*, 26 Ind. App. 62; 59 N. E. 188; *Hawkes v. Phillips*, 7 Gray (Mass.) 284; *Hix v. Davis*, 68 N. C. 231; *Clinton Bank v. Hart*, 5 O. S. 33; *Lowry v. Hardwick*, 4

Humph. (Tenn.) 188; *Sawyer v. White*, 19 Vt. 40.

²² *Finch v. Galigher*, 181 Ill. 625; 54 N. E. 611; *Bute v. Brainerd*, 93 Tex. 137; 53 S. W. 1017.

²³ *Brady v. Pinol County*, — Ariz. —; 71 Pac. 910.

²⁴ *Chicago, etc., Ry. v. Yawger*, 24 Ind. App. 460; 56 N. E. 50.

²⁵ *New Orleans v. Warner*, 175 U. S. 120.

²⁶ *Garden City v. Bank*, 65 Kan. 345; 93 Am. St. Rep. 284; 69 Pac. 325.

§1354. Merger of simple contract in specialty.

A simple contract is merged in a contract under seal.¹ Under the doctrine of merger, delivery of a specialty executed by the debtor² extinguishes a simple contract debt. Thus a simple contract for the sale of real property is merged in a subsequent deed, executed and delivered between the parties in full performance of such contract, and supersedes such provisions of such contract as are covered by the deed.³ Thus a contract for the sale of "merchantable coal" is merged by subsequent deed conveying "all the stone coal" in the specified realty.⁴ So a simple contract to sell a lot for twelve hundred dollars in cash and eighty shares of stock, and providing that a dwelling house costing not less than four thousand dollars shall be erected by vendee upon such lot before a specified date, and that within ten years no improvement should be erected nearer than thirty feet to the rear building line, is merged by a subsequent deed for such lot delivered between the parties, providing that the grantee should not erect upon the lot within ten years a dwelling not to cost less than three thousand dollars, and should not build any improvement nearer than thirty feet to the front building line.⁵ So a contract to convey realty is merged in a subsequent deed executed by a third person if accepted in performance of such contract.⁶ So a contract for the sale of realty reserving timber is merged in a deed for such realty in which timber is not reserved.⁷

¹ Rhoades v. Jones, 92 Ind. 328; Banorsee v. Hovey, 5 Mass. 11; 4 Am. Dec. 17; Baker v. Baker, 28 N. J. L. 13; 75 Am. Dec. 243; Costner v. Fisher, 104 N. C. 392; 10 S. E. 526; McNaughten v. Partidge, 11 Ohio 223; 38 Am. Dec. 731; Nichols v. Thompson, 1 Yerg. (Tenn.) 151; Williamson v. Cline, 40 W. Va. 194; 20 S. E. 917.

² Hall v. Hopkins, 14 Mo. 450; Costner v. Fisher, 104 N. C. 392; 10 S. E. 526.

³ Carroll v. Fuel Co., 26 Can. S. C.

181; Seager v. Cooley, 44 Mich. 14; 5 N. W. 1058; Schoonmaker v. Hoyt, 148 N. Y. 425; 42 N. E. 1059.

⁴ McGowan v. Bailey, 155 Pa. St. 256; 25 Atl. 648.

⁵ West Boundary Real-Estate Co. v. Bayless, 80 Md. 495; 31 Atl. 442.

⁶ Slocum v. Bracy, 55 Minn. 249; 43 Am. St. Rep. 499; 56 N. W. 826.

⁷ Clifton v. Iron Co., 74 Mich. 183; 16 Am. St. Rep. 621; 41 N. W. 891.

§1355. Elements necessary to merger.

In order to have the doctrine of merger operate, the subsequent specialty must bear the following relation to the prior written contract. (1) The specialty must be between the same parties as the prior simple contract and upon the same subject-matter.¹ A subsequent deed, which is not accepted by the grantee in full performance of the prior contract, and does not cover the subject-matter contracted for, does not merge the prior contract. Thus a contract to convey a tract of land, is not merged in a subsequent deed conveying only a part of such tract, which is accepted by the grantee as part performance only of the contract.² So an agreement whereby the grantee is to pay a mortgage upon the premises conveyed as a part of the purchase price, is not merged in a subsequent conveyance.³ So an agreement whereby the grantor is to refund the consideration if the title to the land conveyed is not good, is not merged in a subsequent deed, which contains a covenant of special warranty but none of title.⁴ (2) The subsequent specialty will not merge the prior simple contract unless the specialty is valid.⁵ A subsequent deed, which proves to be void by reason of mistake, does not merge the contract under which it was given.⁶ (3) The specialty will not merge the prior simple contract if it is not intended as satisfaction thereof but merely as collateral security thereto.⁷ Assignment of a specialty by the debtor to the creditor does not operate as a

¹ Chetwynd v. Allen (1899), 1 Ch. 353; Cavanaugh v. Casselman, 88 Cal. 543; 26 Pac. 515; Jones v. Johnson, 3 W. & S. (Pa.) 276; 38 Am. Dec. 760.

² Cavanaugh v. Casselman, 88 Cal. 543; 26 Pac. 515.

³ Stockton v. Gould, 149 Pa. St. 68; 24 Atl. 160.

⁴ Close v. Zell, 141 Pa. St. 390; 23 Am. St. Rep. 296; 21 Atl. 770.

⁵ Gray v. Fowler, 1 H. Bl. 462; Haussman v. Burnham, 59 Conn. 117; 21 Am. St. Rep. 74; 22 Atl.

1065; Thurston v. Percival, 1 Pick. (Mass.) 415.

⁶ Haussman v. Burnham, 59 Conn. 117; 21 Am. St. Rep. 74; 22 Atl. 1065.

⁷ Emes v. Widdowson, 4 C. & P. 151; Tryon v. Hart, 2 Conn. 120; Grant v. School Town, 71 Ind. 58; Heeg v. Weigand, 33 Ind. 289; Pillsbury v. Morris, 54 Minn. 492; 56 N. W. 170; Kemp v. Ry., 156 Pa. St. 430; 26 Atl. 1074; Wolf v. Wyeth, 11 S. & R. (Pa.) 149; Witz v. Fite, 91 Va. 446; 22 S. E. 171.

merger.⁸ An agreement which is intended by the parties to be collateral to the deed when delivered, is not merged by such deed.⁹ Thus a written contract that a certain dam should be maintained adjoining the property sold, is not merged in a subsequent deed of the property contracted for.¹⁰ A contract, whereby a person agrees to convey a right of way to a railroad, and to release the railroad from all damages caused by taking and using such way, is not merged in a subsequent conveyance of such right of way, and the grantor cannot subsequently maintain an action against the railroad for obstructing a right of way owned by the grantor by the use of the right of way thus conveyed to the railroad.¹¹ A sealed instrument which recognizes a prior simple contract as existing, recites a dispute as to the method of ascertaining the amount due thereunder, and fixes the method of ascertaining such amount does not waive such prior contract.¹² A bond executed by a public officer does not merge his liability for money had and received.¹³ It is not necessary that the specialty should show on its face that it is merely collateral to the original contract.¹⁴ An express agreement that a sealed contract delivered to the holder of a promissory note and executed by two out of three of the makers of such note should be accepted as collateral and not as satisfaction prevents merger though the sealed contract contains no such provision.¹⁵ A contract by A, who owns an undivided interest in a tract of land, in common with B, whereby A agrees to convey to X a part of such tract, has been held not to be merged in a subsequent contract between A and B to convey the entire tract to X if not intended as a merger.¹⁶

⁸ *Grant v. School Town*, 71 Ind. 58.

⁹ *Pillsbury v. Morris*, 54 Minn. 492; 56 N. W. 170.

¹⁰ *Shelby v. Ry.*, 143 Ill. 385; 32 N. E. 438.

¹¹ *Kemp v. Ry.*, 156 Pa. St. 430; 26 Atl. 1074.

¹² *Bank v. Patterson*, 7 Cranch (U. S.) 299.

¹³ *Walton v. United States*, 9 Wheat. (U. S.) 651.

¹⁴ *Van Vleit v. Jones*, 20 N. J. L. 340; 43 Am. Dec. 633; *Burke v. Cruger*, 8 Tex. 66; 58 Am. Dec. 102; s. c., 11 Tex. 694; *Witz v. Fite*, 91 Va. 446; 22 S. E. 171.

¹⁵ *Witz v. Fite*, 91 Va. 446; 22 S. E. 171.

¹⁶ *Henry v. Nubert* (Tenn. Ch. App.), 35 S. W. 444.

§1356. Merger of oral contract in written contract.

The enforcement of the parol evidence rule, which was originally adopted by the courts in analogy to the rule of merger, whereby a sealed instrument merged a prior simple contract, leads to the doctrine uniformly recognized and enforced at Modern Law, that a written contract merges all prior and contemporaneous oral negotiations.¹ This is not technically a rule of merger, since the written contract is of no higher grade than the oral contract. The result, however, is substantially the same as if the technical doctrine of merger were applied; since, in an action upon the written contract, neither party can resort to the prior or contemporaneous oral agreement as evidence of the intention of the parties direct.²

§1357. Merger of fraudulent representations.

Fraudulent representations as to incumbrances¹ are not merged in a subsequent deed, containing no covenants of warranty. Fraudulent representations as to title are not merged in a subsequent executory contract of sale under seal, which provides for a warranty deed.² Fraudulent representations as to the solvency of the makers of a note by the payee who thereby induces another to accept such note in payment for realty, are not merged in an indorsement by him without recourse.³

¹McKinley v. Williams, 74 Fed. 94; 20 C. C. A. 312; West Coast Lumber Co. v. Apfield, 86 Cal. 335; 24 Pac. 993; Polhill v. Brown, 84 Ga. 338; 10 S. E. 921; Covell v. Benjamin, 35 Ill. App. 297; Shirk v. Mitchell, 137 Ind. 185; 36 N. E. 850; Stewart v. Babbs, 120 Ind. 568; 22 N. E. 770; Indianapolis Terra-Cotta Co. v. Murphy, 99 Ia. 633; 68 N. W. 898; Cable v. Foley, 45 Minn. 421; 47 N. W. 1135; Odoneal v. Henry, 70 Miss. 172; 12 So. 154; Boyd v. Paul, 125 Mo. 9; 28 S. W. 171; Plumb v. Cooper, 121 Mo. 668; 26 S. W. 678; Tracy v. Iron Works, 29 Mo. App. 342;

Clarke v. Kelsey, 41 Neb. 766; 60 N. W. 138; Societa Italiana v. Sulzer, 138 N. Y. 468; 34 N. E. 193; Smith v. Lennon, 131 N. Y. 560; 29 N. E. 820; Hartsfield v. Chamblin, 44 S. C. 110; 21 S. E. 798; Jones v. Gilchrist, 88 Tex. 88; 30 S. W. 442; Pegues v. Haden, 76 Tex. 94; 13 S. W. 171.

²See Ch. LVI.

¹Skinner v. Christie, 52 N. J. Eq. 720; 29 Atl. 772.

²Daly v. Bernstein, 6 N. M. 380; 28 Pac. 764.

³Gates v. Moldstad, 14 Wash. 119; 44 Pac. 881.

CHAPTER LXIV.

BREACH OF EXPRESSED CONDITION AS DISCHARGE.

§1358. Validity of contract conditioned on existence of fact.

The validity of a contract may be made conditional upon the existence of certain facts. If such facts do not exist the contract is of course unenforceable.¹ Thus the validity of a contract may be made contingent upon the fact that the adversary party has paid a certain price for the property in question,² that a third person buys property at a certain price,³ or that a seam of stone does not exist on a certain tract of realty.⁴ A contract whereby A agrees to construct a street railway as a connecting line between two roads owned by other persons, is discharged where the other roads refused to connect with such line.⁵ The principles of fraud, misrepresentation and mistake have no application to cases like these, where the validity of the contract is made to depend on the existence of specified facts. Hence, it makes no difference whether the fact stipulated for is an essential element of the contract or a collateral fact; or whether it is material or immaterial.⁶

¹ *Sterrick v. McBride*, 157 Ill. 70; 41 N. E. 744; *Miller v. Nugent*, 12 Ind. App. 348; 40 N. E. 282; *Dodson v. Crocker*, — S. D. —; 94 N. W. 391; *Harran v. Klaus*, 79 Wis. 383; 48 N. W. 479.

² *Harran v. Klaus*, 79 Wis. 383; 48 N. W. 479.

³ *Miller v. Nugent*, 12 Ind. App. 348; 40 N. E. 282.

⁴ *Sterrick v. McBride*, 157 Ill. 70; 41 N. E. 744.

⁵ *Simonds v. Ry.*, 13 Conn. 513; 48 Atl. 210. Accordingly, parties who had owned such franchise, and had transferred it to A, in consideration of his agreement to build the road, cannot recover the franchise from A where he has surveyed the road and stopped further work, only on refusal of the other roads to make connections.

⁶ See § 61.

§1359. Contract discharged by happening of express condition.

A contract may provide in express terms that upon the happening of a specified condition subsequent the contract shall thereby be discharged. In such cases the happening of the condition discharges the contract.¹ The termination of a contract by one party in accordance with a provision therein is not breach,² and does not discharge the adversary party if the termination was not by the terms of the contract to act as a discharge,³ and does not entitle the adversary party to damages.⁴ The question usually presented in such cases is as to the construction of the clause imposing such conditions subsequent. Thus a contract for street-car advertising to last until the termination of the right of the street-car company to maintain advertisements in its street-cars, has been held to terminate when the street-car company sells all its advertising interests.⁵ So an agreement between stockholders that on sale of stock by any party thereto, the others should have the first chance to purchase, the contract to terminate whenever either party should have disposed of the shares at the time owned by him, was held to terminate as to all the parties by the transfer by one stockholder of her stock to a person not a party to such contract, the other stockholders consenting.⁶ A clause requiring one party to give notice to the other of the facts operating as a condition subsequent into order to discharge the first party must be substantially complied with. Thus a provision in a building contract that the contractor shall for each day that he is in default pay to the owner five dollars as liquidated damages, but that if delays are due to default of other contractors, such contractor is discharged from liability thereof on giving written notice of such fact to the owner, the contractor is not

¹ *Eastern Advertising Co. v. McGaw*, 89 Md. 72; 42 Atl. 923; *Matter of Petition of the Argus Co.*, 138 N. Y. 557; 34 N. E. 388.

² *Sibley v. Life Association*, 87 Ga. 738; 13 S. E. 838; *Sirk v. Ela*, 163 Mass. 394; 40 N. E. 183.

³ *Lowell v. Ry.*, 90 Me. 80; 37 Atl. 869.

⁴ *Merriman v. Machine Co.*, 96 Wis. 600; 71 N. W. 1050.

⁵ *Eastern Advertising Co. v. McGaw*, 89 Md. 72; 42 Atl. 923.

⁶ *Matter of the Petition of the Argus Co.*, 138 N. Y. 557; 34 N. E. 388.

discharged if he does not give such notice.⁷ Provisions requiring notice need, however, only to be complied with substantially. Thus A and B made a contract with X requiring A and B to give certain notice to X. A subsequently sold his interest to X. A notice from B alone was held sufficient.⁸ A provision requiring completion of a building contract by a certain time, only "provided there be no interference from labor strikes," does not excuse the contractor for delay caused by his employes' quitting work because the contractor did not pay them their wages.⁹ A contract providing for termination by one party if the other is in default cannot be terminated by one who is himself in default and whose default has caused the default of the adversary party. Thus in such a contract a bridge company did not pay for work done and materials delivered as by its contract it was bound to do. By reason of such default the contractors were unable to proceed. The bridge company cannot, on their default, exercise its option to terminate such contract.¹⁰ Thus under a provision to that effect a vendor may rescind a contract for the sale of realty if any objection is made to the title which he is unable or unwilling to remove,¹¹ and he may exercise such option after the purchaser has sued for rescission subject to a liability for costs.¹² Under a provision in a building contract allowing the owner under certain conditions to complete the contract at the expense of the contractor, his doing so does not discharge the contract further than is necessarily effected by such provision.¹³ On the one hand the contractor is entitled to the balance of the contract price above the cost of completion, as the owner cannot refuse payment on the ground that the con-

⁷ *Feeney v. Bardsley*, 66 N. J. L. 239; 49 Atl. 443.

⁸ *Holt v. Silver*, 169 Mass. 435; 48 N. E. 837.

⁹ *McLeod v. Genius*, 31 Neb. 1; 47 N. W. 473.

¹⁰ *O'Connor v. Bridge Co.*, 95 Ky. 633; 27 S. W. 251, 983.

¹¹ *In re Deighton's Contract* (1898) (C. A.), 1 Ch. 458.

¹² *Isaacs v. Towell* (1898), 2 Ch. 285.

¹³ *Christopher, etc., Co. v. Yeager*, 202 Ill. 486; 67 N. E. 166; *Hay v. Bush*, 110 La. 575; 34 So. 692; *Brown v. Baton Rouge*, 109 La. 967; 34 So. 41; *Crouch v. Gutman*, 134 N. Y. 45; 30 Am. St. Rep. 608; 31 N. E. 271.

tractor has not performed the contract on his part to be performed;¹⁴ and on the other, he is liable for whatever damage his default has caused the owner.¹⁵ However, a provision for an architect's certificate of completion as a condition precedent to the contractor's recovery is waived thereby.¹⁶ Under a provision that if the contractor abandons his contract the owner is to complete it, its abandonment by the contractor does not discharge the owner.¹⁷ A provision inserted for the benefit of one party, authorizing him to terminate the contract in event of default by the other, cannot be taken advantage of by such other.¹⁸ A provision inserted for the benefit of the owner that, if emergency demands, the engineer in charge "may make alterations in any part of the work," cannot be invoked by the contractor to require such alterations to be made for his benefit.¹⁹ A provision for discharge for non-performance inserted in a land contract for the benefit of the vendor, and to be exercised at his option cannot be taken advantage of by the vendee.²⁰ So a provision inserted for the benefit of the vendor, that default by the vendee in paying the purchase money note at maturity shall make the contract void, cannot be taken advantage of by the vendee.²¹ Thus default in payment of interest on school lands purchased by the defaulting vendee does not discharge him from liability for the purchase price if the state wishes to treat the contract as in effect, though a statutory

¹⁴ *Charles v. Lumber & Mfg. Co.*, 22 Colo. 283; 43 Pac. 548; *Arndt v. Keller*, 96 Wis. 274; 71 N. W. 651.

¹⁵ *New York v. Construction Co.*, 146 N. Y. 210; 40 N. E. 771.

¹⁶ *Campbell v. Coon*, 149 N. Y. 556; 38 L. R. A. 410; 44 N. E. 300.

¹⁷ *Marcus Sayre Co. v. Burnz* (N. J. Eq.), 26 Atl. 911.

¹⁸ *Orr v. State*, 56 Ark. 107; 19 S. W. 319; *Shouse v. Doane*, 39 Fla. 95; 21 So. 807; *Lasher v. Ins. Co.*, 115 Ia. 231; 88 N. W. 375; *Westervelt v. Huiskamp*, 101 Ia. 196; 70 N. W. 125; *Robbins v. Morgan*, 56 Minn. 304; 57 N. W. 799; *Vickers*

v. Commercial Co., 66 N. J. L. 9; 48 Atl. 606.

¹⁹ *National Contracting Co. v. Commonwealth*, 183 Mass. 89; 66 N. E. 639. ("May" does not here mean "shall.")

²⁰ *Wilcoxson v. Stitt*, 65 Cal. 596; 52 Am. Rep. 310; 4 Pac. 629; *Mason v. Caldwell*, 10 Ill. 196; 48 Am. Dec. 330; *Barbour v. Brookie*, 3 J. J. Mar. (Ky.) 511; *Niles v. Phinney*, 90 Me. 122; 37 Atl. 880; *Meagher v. Hoyle*, 173 Mass. 577; 54 N. E. 347.

²¹ *Westervelt v. Huiskamp*, 101 Ia. 196; 70 N. W. 125.

provision makes such default work a forfeiture.²² The option to terminate may be intended for the benefit of the vendee or lessee. A provision, "In case no well is completed within thirty days from this date then this grant shall become null and void unless second party shall pay to first party thirty dollars each and every month in advance, while such completion is delayed," gives the option to the lessee either to keep the lease alive by making such payments, or to terminate it by refusing to make them.²³

§1360. Option to one party to discharge.

A contract may contain an express provision that one or either party may terminate such contract at his option. Full effect is given to such provisions and the exercise of such option operates as a discharge of the contract.¹ Until such option is exercised the contract is binding upon both parties.² Where the option to terminate the contract at will exists, a question presented for decision is what amounts to the exercise of such option. The right to avoid a purchase of stock is not exercised by acting as a stockholder giving a proxy and offering the stock for sale. Such acts amount to affirmance, not rescission.³ So an option to avoid a contract within a year from the date of the making thereof is not exercised by a written request for an extension of such time to enable the party making the request to determine whether it would be possible for him to go on with the contract.⁴ An option to terminate a contract employing a teacher by giving one week's notice may be exercised by refusal to employ such teacher before the school opens, and the teacher is then entitled to but

²² *Orr v. State*, 56 Ark. 107; 19 S. W. 319.

²³ *Van Etten v. Kelly*, 66 O. S. 605; 64 N. E. 560.

¹ *Louisiana, etc., Ry. v. District Commissioners*, 87 Fed. 594; 31 C. C. A. 121; *Thayer v. Allison*, 109 Ill. 180; *Morrissey v. Broomal*, 37 Neb. 766; 56 N. W. 383; *Booth v.*

Ratliffe, 107 N. C. 6; 12 S. E. 112; *Foster v. Henderson*, 29 Or. 210; 45 Pac. 899.

² *Kenny v. Knight*, 119 Fed. 475.

³ *Jessop v. Ivory*, 158 Pa. St. 71; 27 Atl. 840.

⁴ *Ford v. Dyer*, 148 Mo. 528; 49 S. W. 1091.

one week's salary.⁵ An option to rescind a contract for breach and recover money paid thereunder may be exercised before the date of the maturity of the last payment.⁶ Under a contract for the sale of iron providing that the manufacturer should not be liable for loss or damage arising from non-fulfillment by reason of strikes or fires, and allowing him if he wishes to transfer his contract to any reputable manufacturer, destruction of the manufacturer's mill by fire discharges the contract at his election and he is not bound to transfer the contract or obtain the iron elsewhere.⁷ However, if notice of delay by reason of epidemics, strikes and the like, must be given to obtain an extension of time by the terms of the contract, the happening of such event does not extend the time unless such notice is given.⁸ A provision allowing a contract to be cancelled "for any good cause" on sixty days' notice by either party, means any cause assigned in good faith.⁹ So a provision in a mining contract that the owner may terminate it if satisfied that the system of mining was prejudicial to the mine does not give him the right to terminate it arbitrarily.¹⁰

§1361. Implied option to discharge contract of indefinite duration.

If no time is fixed by the contract for its duration, and the contract from its nature is one which might last indefinitely, either party may at his option terminate such contract.¹ Thus a contract of employment as land agent,² a contract to repair and construct buildings as directed by the adversary party, no particular buildings being designated,³ a contract by retail

⁵ Derry v. Board of Education, 102 Mich. 631; 61 N. W. 61.

⁶ Lord v. Board of Trade, 163 Ill. 45; 45 N. E. 205.

⁷ Western, etc., Co. v. Steel Co., 116 Fed. 176.

⁸ Florida Northern Ry. v. Supply Co., 112 Ga. 1; 37 S. E. 130.

⁹ Cummer v. Butts, 40 Mich. 322; 29 Am. Rep. 530.

¹⁰ Anvil Mining Co. v. Humble, 153 U. S. 540.

¹ Chattanooga, etc., Ry. v. Ry., 44 Fed. 456; Long v. Kee, 42 La. Ann. 899; 8 So. 610; Savage v. Surgical Association, 59 Mich. 400; 26 N. W. 652.

² Howard v. Ry., 91 Ala. 268; 8 So. 868.

³ Quin v. Distilling Co., 171 Mass. 283; 50 N. E. 637.

dealers to buy oil of a wholesale dealer exclusive, without limitation as to time,⁴ and a contract to manufacture articles for a corporation for an indefinite time in the future,⁵ may each be discharged at any time at the option of either party as to the part thereof which remains executory. A reasonable notice of the exercise of such option must be given when the absence thereof will inflict injury upon the adversary party which the parties to the original contract did not contemplate, and cannot be understood to have intended. Thus before exercise of a right to terminate a contract of indefinite duration for one railway's using a freight depot and the tracks of another railway company,⁶ or for the management of a road jointly constructed by the two railway companies,⁷ reasonable notice must be given. If the parties to a contract for the management of a road jointly owned by both railroad companies cannot agree upon regulations for the operation of such road, the court may make temporary orders to enable both parties to use the road, pending final judgment in a suit for specific performance and injunction.⁸ A agreed with B to manage B's plantation and stock farm, and as compensation A was to have the products of the farm and one half of the increase of the stock. No time for the termination of such contract was fixed. A was allowed to terminate the contract at any time, upon giving due notice and taking possession at the beginning of some designated year.⁹ Even though no time is fixed for the termination of the contract, the surrounding circumstances may indicate that the parties did not intend to give either party a right to discharge it at his option. A, an employer, took an employee who was seriously injured, to a hospital, and left him there, promising to pay for his care. No provision was made as to the length of time which he was to remain. It was held

⁴ *Marble v. Oil Co.*, 169 Mass. 553; 48 N. E. 783.

⁵ *Kenderdine Hydro-Carbon Fuel Co. v. Plumb*, 182 Pa. St. 463; 38 Atl. 480.

⁶ *Chattanooga, etc., Ry. v. Ry.*, 44 Fed. 456.

⁷ *Philadelphia, etc., Ry. v. River*

Front R. R. Co., 168 Pa. St. 357; 31 Atl. 1098.

⁸ *Philadelphia, etc., Ry. v. River Front R. R. Co.*, 168 Pa. St. 357; 31 Atl. 1098.

⁹ *Long v. Kee*, 42 La. Ann. 899; 8 So. 610.

that this implied an agreement on A's part to pay for such care until at least such time as he could be moved without great danger to his health. Accordingly, where A gave such notice before such time, and it was not shown that the employee had means of his own to pay for such care, such notice does not discharge A's liability to the hospital.¹⁰ A contract to drive logs, for the termination of which no time is designated, may appear from the surrounding circumstances to be intended to last until all the timber has been cut off the land of the owner thereof. Such contract cannot be terminated by notice before the timber is exhausted.¹¹

¹⁰ *St. Barnabas Hospital v. Electric Co.*, 68 Minn. 254; 40 L. R. A. 388; 70 N. W. 1126.

¹¹ *Mississippi River Logging Co. v. Robson*, 69 Fed. 773; 16 C. C. A. 400; s. c., 43 Fed. 364.

CHAPTER LXV.

IMPOSSIBILITY.

§1362. Effect of impossibility upon obligation not expressly assumed.

Whether impossibility arising without the fault of the promisor, after a contract has been entered into, discharges the promisor from liability for failure to perform, depends, in the first instance, upon whether his liability to perform is an implied obligation imposed by rules of law, or is created by an express promise. If the surrounding facts and circumstances in connection with rules of law, impose the liability in question, a subsequent impossibility arising without the fault of the promisor, discharges him from liability.¹ Thus, a common carrier, whose liability to transport and deliver is implied from the circumstances of his accepting goods for transportation, is discharged by subsequent impossibility, which amounts to an act of God,² or an act of the public enemy. Thus an unexpected freezing of a river,³ or an unexpected flood,⁴ is an act of God. To effect a discharge of liability in such cases, the direct and sole cause of the loss must be the act of God.⁵ If the negligence of the carrier contributes to the loss, the fact that an act of God is in part the operating cause of the loss does not discharge his liability.⁶ Thus if a flood (such as the Johns-

¹ *Hick v. Rodocanachi* (1891), 2 Q. B. 626.

² *Wald v. Ry.*, 162 Ill. 545; 53 Am. St. Rep. 332; 35 L. R. A. 356; 44 N. E. 888.

³ *Crosby v. Fitch*, 12 Conn. 410; 31 Am. Dec. 745.

⁴ *Smith v. Ry.*, 91 Ala. 455; 24 Am. St. Rep. 929; 11 L. R. A. 619; 8 So. 754; *Ryan v. Rogers*, 96 Cal.

349; 31 Pac. 244; *Libby v. Ry.*, 85 Me. 34; 20 L. R. A. 812; 26 Atl. 943.

⁵ *Michigan Central Ry. v. Burrows*, 33 Mich. 6; *Davis v. Ry.*, 89 Mo. 340; *Daniels v. Ballentine*, 23 O. S. 532; 13 Am. Rep. 264.

⁶ *Smith v. Trading Co.*, 20 Wash. 580; 44 L. R. A. 557; 56 Pac. 372.

town flood) causes a wreck, and the carrier neglects to protect the goods, which are plundered, the negligence of the carrier to guard the goods contributes to the loss and the carrier is liable.⁷ Since these are cases in which the liability is imposed by law and not created by contract, further discussion here is unnecessary.

§1363. Effect of impossibility upon liability expressly assumed.

If the liability of the promisor is created by an express promise, subsequent impossibility does not, as a general rule, excuse performance.¹ Thus where an insured became insane, and by reason of that fact did not pay the assessments upon his policy, and the policy thereby lapsed, such insanity did not excuse the failure to pay the assessments.² Certain classes of subsequent impossibility, however, discharge a promisor from liability which is created by his express promise. What classes of such impossibility amount to such discharge, according to the view entertained by modern authorities, depends upon the intention of the parties as deduced from the terms of the contract. If the event which has happened is one which is not fairly within the meaning of the contract, and cannot be assumed to have been contemplated by the parties, such event operates as a discharge.³ This form of stating the rule conforms more closely to the facts than the alternative form of stating it, namely, that the event creating impossibility must be considered to have been intended by the parties as an implied condition subsequent upon the happening of which the contract should be discharged.⁴ This last method of stating the rule, is inexact, since, in the

⁷ *Lang v. Ry.*, 154 Pa. St. 342; 35 Am. St. Rep. 846; 20 L. R. A. 360; 26 Atl. 370.

¹ *School Dist. v. Dauchy*, 25 Conn. 530; 68 Am. Dec. 371; *Anderson v. May*, 50 Minn. 280; 36 Am. St. Rep. 642; 17 L. R. A. 555; 52 N. W. 530; *Cowley v. Davidson*, 13 Minn. 92.

² *Pitts v. Ins. Co.*, 66 Conn. 376; 50 Am. St. Rep. 96; 34 Atl. 95.

³ *Stewart v. Stone*, 127 N. Y. 500; 14 L. R. A. 215; 28 N. E. 595; *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415; *Parker v. Macomber*, 17 R. I. 674; 16 L. R. A. 858; 24 Atl. 464.

⁴ *Dolan v. Rodgers*, 149 N. Y. 489; 44 N. E. 167.

cases under consideration the event which operates a discharge is not contemplated by either party. Whether an exact classification of the events causing subsequent impossibility, which are not within the fair meaning of the contract as made by the parties, is possible, is a question upon which the courts are not in perfect accord. Some authorities have restricted such events to three classes: (1) Where the impossibility is created by law. (2) Where the continued existence of something essential to the performance is an implied condition of the contract. (3) Where contracts are made for personal services which cannot be performed by the assignee or a personal representative.⁵ As will be seen later,⁶ some jurisdictions recognize classes of impossibility as amounting to a discharge which cannot be brought within any one of these three classes, except by a most artificial use of the terms employed. Where the doctrine of subsequent impossibility is recognized, such impossibility acts as a discharge of the contract, but is by no means the same thing as a performance of it. The promisor may invoke the subsequent impossibility as a defense in an action against him for breach of the contract, but he cannot enforce the contract against the promisee as if he had performed it.⁷ Recovery for work done under a contract may be had where subsequent impossibility discharges the parties from further performance.⁸ On the other hand, the promisee cannot insist on a different method of performance from that provided by the contract. Under a contract to construct a tunnel, which proves impossible of performance on account of the nature of the ground, the contractors cannot be required to construct a tunnel upon different plans and specifications.⁹

⁵ *Middlesex Water Co. v. Whiting Co.*, 64 N. J. L. 240; 81 Am. St. Rep. 467; 49 L. R. A. 572; 45 Atl. 692.

⁶ See §§ 1368, 1369.

⁷ *Remy v. Olds*, 88 Cal. 537; 21 L. R. A. 645; 26 Pac. 355.

⁸ *Dolan v. Rodgers*, 149 N. Y. 489; 44 N. E. 167; *Parker v. Macomber*, 17 R. I. 674; 16 L. R. A. 858; 24 Atl. 464.

⁹ *Milwaukee v. Shailer*, 84 Fed. 106; 28 C. C. A. 286.

§1364. Impossibility in contracts for personal services.—Death.

A contract whereby the promisor is to perform certain services of a personal nature, and such as cannot be performed by his assignee, or his successors, is discharged by the death, of either party,¹ whether of the party who was to perform such services,² or of the party for whom such services were to be performed.³ Thus a contract to support another,⁴ is discharged by the death of either party to such contract. A promise by A to B to pay a certain sum if B marries C is not, however, discharged by A's death.⁵ So a contract for services as an attorney,⁶ or a consulting engineer,⁷ or for managing an invention,⁸ or to act as business manager of a band,⁹ or not to carry on a business,¹⁰ or to sell hemp "of his own raising,"¹¹ have each been held a contract for personal services which was discharged by the death of either party. A contract of agency not creating a power coupled with an interest is terminated by the death of either party.¹² Thus

¹ *Hyde v. Dean of Windsor*, Cro. Eliz. 552; *Siboni v. Kirkman*, 1 M. & W. 418; *Marvel v. Phillips*, 162 Mass. 399; 44 Am. St. Rep. 370; 26 L. R. A. 416; 38 N. E. 1117; *Spalding v. Rosa*, 71 N. Y. 40; 27 Am. Rep. 7; *Siler v. Gray*, 86 N. C. 566; *Parker v. Macomber*, 17 R. I. 674; 16 L. R. A. 858; 24 Atl. 464.

² *Stubbs v. Ry.*, L. R. 2 Exch. 311; *Cooke v. Colcraft*, 2 W. Bl. 856; *Marvel v. Phillips*, 162 Mass. 399; 44 Am. St. Rep. 370; 26 L. R. A. 416; 38 N. E. 1117; *Blakely v. Sousa*, 197 Pa. St. 305; 80 Am. St. Rep. 821; 47 Atl. 286.

³ *Krumdieck v. White*, 92 Cal. 143; 28 Pac. 219; *Lacy v. Getman*, 119 N. Y. 109; 16 Am. St. Rep. 806; 6 L. R. A. 728; 23 N. E. 452.

⁴ Death of party bound to furnish support. *Parker v. Macomber*, 17 R. I. 674; 16 L. R. A. 858; 24 Atl. 464. Death of party to be supported. *Glidden v. Korter*, 90 Me 269; 38 Atl. 159.

⁵ *Berisford v. Woodroff*, Cro. Jac. 404.

⁶ *Whitehead v. Lord*, 7 Exch. 691; *Moyle v. Landers*, 78 Cal. 99; 12 Am. St. Rep. 22; 20 Pac. 241; *Turnan v. Temke*, 84 Ill. 286; *Clegg v. Baumberger*, 110 Ind. 536; 9 N. E. 700; *Clayton v. Merrett*, 52 Miss. 353.

⁷ *Stubbs v. Ry.*, L. R. 2 Exch. 311.

⁸ *Marvel v. Phillips*, 162 Mass. 399; 44 Am. St. Rep. 370; 26 L. R. A. 416; 38 N. E. 1117.

⁹ *Blakely v. Sousa*, 197 Pa. St. 305; 80 Am. St. Rep. 821; 47 Atl. 286.

¹⁰ *Cooke v. Colcraft*, 2 W. Bl. 856.

¹¹ *Shultz v. Johnson*, 5 B. Mon. (Ky.) 497.

¹² *Howe Sewing Machine Co. v. Rosensteel*, 24 Fed. 583; *Adriance v. Rutherford*, 57 Mich. 170; 23 N. W. 718; *McDonald v. Black*, 20 Ohio 185; 55 Am. Dec. 448.

authority to sell property,¹³ as personalty,¹⁴ or to collect money,¹⁵ is revoked by the death of the principal. In some cases, however, transactions of third persons with agents after the death of the principal, but in ignorance thereof, have been upheld as binding on the principal's estate. Thus payment to an agent,¹⁶ or a purchase of goods by him,¹⁷ or delivery of notes by him,¹⁸ have, contrary to the general rule, been upheld under such circumstances. So a contract to prosecute a claim, which was in part performed after the client's death, has been held not to be discharged.¹⁹ Some of the cases, however, which appear to support this proposition really depend upon principles of estoppel. The administrator of the decedent,²⁰ or those who succeed the principal in interest,²¹ have, with full knowledge of the material facts, elected to accept the benefits of the agent's acts, and are therefore estopped to deny his authority.²² If the agent's power is also coupled with an interest in the subject of the agency, the death of the principal²³ does not revoke the power of the agent. What constitutes a power coupled with an interest is a question on which the courts have disagreed. A power of sale in a mortgage to be exercised by the mortgagee has been held in some states to be such a power coupled with an interest that it is not revoked by the death of the mortgagor,²⁴ and the same principle has

¹³ *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Scruggs v. Driver*, 31 Ala. 274; *Harris v. Irving*, 28 Cal. 645; *Travers v. Crane*, 15 Cal. 12; *Lewis v. Kerr*, 17 Ia. 73.

¹⁴ *Dickinson v. Calahan*, 19 Pa. St. 227.

¹⁵ *Weber v. Bridgman*, 113 N. Y. 600; 21 N. C. 985; *Davis v. Bank*, 46 Vt. 728.

¹⁶ *Cassiday v. McKenzie*, 4 Watts & S. (Pa.) 282; 39 Am. Dec. 76.

¹⁷ *Davis v. Davis*, 93 Ala. 173; 9 So. 736; *Garrett v. Trabue*, 82 Ala. 227; 3 So. 149.

¹⁸ *Nicolet v. Pillot*, 24 Wend. (N. Y.) 240.

¹⁹ *Wylie v. Coxe*, 15 How. (U. S.) 415.

²⁰ *Succession of Zenon & Elise Labauve*, 34 La. Ann. 1187.

²¹ *Ish v. Crane*, 8 O. S. 520; s. c., 13 O. S. 574.

²² See § 968.

²³ *Gordon v. Stubbs*, 36 La. Ann. 625; *Merry v. Lynch*, 68 Me. 94; *White v. Allen*, 133 Mass. 423; *Knapp v. Alvord*, 10 Paige (N. Y.) 205; 40 Am. Dec. 241.

²⁴ *Hudgins v. Morrow*, 47 Ark. 515; 2 S. W. 104; *Strother v. Law*, 54 Ill. 413; *Barrick v. Horner*, 78 Md. 253; 44 Am. St. Rep. 283; 27 Atl. 1111; *Connors v. Holland*, 113 Mass. 50; *Beatie v. Butler*, 21 Mo. 313; 64 Am. Dec. 234; *Carter v. Slocomb*, 122 N. C. 475; 65 Am. St. Rep. 714; 29 N. E. 720; *Reilly*

been applied to powers of sale in deeds of trust.²⁵ In other states the death of the mortgagor is held to revoke a power of sale in a mortgage.²⁶ A contract by a pastor to pay an organist personally is discharged by the pastor's death, the church being thereafter closed.²⁷ A contract between the state and an employer of convict labor is discharged by the death of such employer.²⁸ A contract of employment between joint employers on the one side and an agent on the other has been held not to be discharged by the death of one of the principals.²⁹ The death of a partner discharges contracts of employment so that if no services are rendered thereunder after such partner's death the employee cannot recover.³⁰ On the other hand, if the surviving partner continues the partnership business and treats the contract of employment as in force, the death of the partner does not as a matter of law work a discharge.³¹ Thus the firm of A and B had a contract with X for employment for one year which at his option was renewable for another year. Soon after the contract was made A died. B continued the business and treated X's contract as in full force until the end of the first year of X's employment, when on X's demand for a renewal for a second year, B refused. It was held that B was liable to X for breach of such contract.³² An executory contract to form a partnership is discharged by the death of one of the parties.³³

v. Phillips, 4 S. D. 604; 57 N. W. 780.

²⁵ Hodges v. Gill, 9 Baxt. (Tenn.) 378; Wilburn v. Spofford, 4 Sneed (Tenn.) 698.

²⁶ Wilkins v. McGehee, 86 Ga. 764; 13 S. E. 84; Miller v. McDonald, 72 Ga. 20; Johnson v. Johnson, 27 S. C. 309; 13 Am. St. Rep. 636; 3 S. E. 606; Buchanan v. Monroe, 22 Tex. 537.

²⁷ Harrison v. Conlan, 10 All. (Mass.) 85.

²⁸ State v. Oliver, 78 Miss. 5; 27 So. 988. Hence the estate and

bondsmen of such employer are liable only up to his death.

²⁹ Martin v. Hunt, 1 All. (Mass.) 418.

³⁰ Griggs v. Swift, 82 Ga. 392; 14 Am. St. Rep. 176; 5 L. R. A. 405; 9 S. E. 1062.

³¹ Hughes v. Gross, 166 Mass. 61; 55 Am. St. Rep. 375; 32 L. R. A. 620; 43 N. E. 1031.

³² Hughes v. Gross, 166 Mass. 61; 55 Am. St. Rep. 375; 32 L. R. A. 620; 43 N. E. 1031.

³³ Dow v. Bank, 88 Minn. 355; 93 N. W. 121.

§1365. Sickness.

A contract for services personal in their nature which cannot be performed by deputy within the meaning of the contract is discharged by such sickness on the part of the person by whom such services are to be rendered as to incapacitate him from performing them.¹ If no fault of his intervenes between the making of such contract and his sickness creating such conditions, he is not liable in damages for breach of such contract. Thus a contract for the services of an opera troupe is discharged by the sickness of the leading tenor, without whom the troupe could not perform.² Under a contract of employment requiring the employee to give notice before leaving the service, such provision is discharged by the sickness of the employee.³ So if A agrees to marry B, and subsequently A, without his fault, develops a disease which makes it unsafe or improper for him to marry,⁴ as where sexual intercourse would shorten his life,⁵ or where without intervening fault, a venereal disease develops,⁶ A's contract is discharged absolutely if the physical disability is permanent in its nature; and if temporary, he is excused from liability for breach by delay until such physical disability is removed.⁷ Sickness which does not make the marriage impossible is not, however, a discharge.⁸ In exceptional cases, apprehended illness may operate as a discharge. Thus where A agrees to purchase an interest as partner in B's business, the value of which depended on B's knowledge and business ability, A may avoid such contract where B's health

¹ Powell v. Newell, 59 Minn. 406; 61 N. W. 335.

² Spalding v. Rosa, 71 N. Y. 40; 27 Am. Rep. 7.

³ Harrington v. Iron Works Co., 119 Mass. 82; Fuller v. Brown, 11 Met. (Mass.) 440.

⁴ Shakleford v. Hamilton, 93 Ky. 80; 40 Am. St. Rep. 166; 15 L. R. A. 531; 19 S. W. 5; Allen v. Baker, 86 N. C. 91; 41 Am. Rep. 444; Sanders v. Coleman, 97 Va. 690;

47 L. R. A. 581; 34 S. E. 621.

⁵ Sanders v. Coleman, 97 Va. 690;

47 L. R. A. 581; 34 S. E. 621.

⁶ Trammel v. Vaughan, 158 Mo. 214; 81 Am. St. Rep. 302; 51 L. R. A. 854; 59 S. W. 79.

⁷ Trammel v. Vaughan, 158 Mo. 214; 81 Am. St. Rep. 302; 51 L. R. A. 854; 59 S. W. 79.

⁸ Smith v. Compton, 67 N. J. L. 548; 58 L. R. A. 480; 52 Atl. 386.

becomes such as to make it doubtful whether he will be able to give his personal attention to the business.⁹

§1366. Arrest.

A contract for services involving personal skill and ability, is discharged by the arrest of the employe, and his detention for a considerable period of time.¹ The employer may relieve himself from liability by paying to his employe what he had earned up to the time of his arrest, and may then permit him to enter his employment upon his release from prison.

§1367. Death of party to contract not for personal services.

A contract for services which are not personal in their nature, but which may be performed by the assignee or the successors of the promisor, is not discharged by the death of either party.¹ Thus, a contract of guaranty,² or of sale,³ or a contract between a landlord and tenant,⁴ a covenant to rebuild leased property in case of fire,⁵ a contract to repair,⁶ or a contract to renew,⁷

⁹ Powell v. Cash, 54 N. J. Eq. 218; 34 Atl. 131.

¹ Leopold v. Salkey, 89 Ill. 412; 31 Am. Rep. 93.

¹ Morgan v. Ravey, 6 Hurl. & N. 265; Nield v. Smith, 14 Ves. Jr. 491; Drummond v. Crane, 159 Mass. 577; 38 Am. St. Rep. 460; 23 L. R. A. 707; 35 N. E. 90; Cox v. Martin, 75 Miss. 229; 65 Am. St. Rep. 604; 36 L. R. A. 800; 21 So. 611; McLaughlin v. McLaughlin, 145 Pa. St. 582; 23 Atl. 400; Billing's Appeal, 106 Pa. St. 558.

² Lloyd's v. Harper, L. R. 16 Ch. Div. 290; Hightower v. Moore, 46 Ala. 387; Janin v. Browne, 59 Cal. 37; Menard v. Scudder, 7 La. Ann. 385; 56 Am. Dec. 610. Such contract is not released by the death of a joint guarantor. Carter v. Hampton, 77 Va. 631.

³ Personalty. Wentworth v. Cock,

10 Ad. & El. 42; Smith v. Mfg. Co., 83 Ill. 498; McKeown v. Harvey, 40 Mich. 226; Sabre v. Smith, 62 N. H. 663; Mactier v. Frith, 6 Wend. (N. Y.) 103; 21 Am. Dec. 262. Realty. Denton v. Sanford, 103 N. Y. 607; 9 N. E. 490. Death of vendor after breach. Fowler v. Kelly, 3 W. Va. 71.

⁴ Alsop v. Banks, 68 Miss. 664; 24 Am. St. Rep. 294; 13 L. R. A. 598; 9 So. 895; Becker v. Walworth, 45 O. S. 169; 12 N. E. 1; Keating v. Condon, 68 Pa. St. 75; Volk v. Stowell, 98 Wis. 385; 74 N. W. 118.

⁵ Chamberlain v. Dunlap, 126 N. Y. 45; 22 Am. St. Rep. 807; 26 N. E. 966.

⁶ Chamberlain v. Dunlap, 126 N. Y. 45; 22 Am. St. Rep. 807; 26 N. E. 966.

⁷ Hyde v. Skinner, 2 P. Wms. 196.

are none of them discharged by the death of either party. A contract for future repairs of a partition fence, made between adjoining property owners, has been held to be discharged by the death of one of them.⁸ So a contract of fire insurance,⁹ or a contract to take and pay for a certain amount of water annually,¹⁰ or a deed of trust upon growing crops to secure advancements,¹¹ are none of them discharged by the death of either party. So a contract in settlement of a bastardy suit,¹² or a contract of pledge,¹³ or a contract giving the debtor the right to discharge his debt by sawing lumber,¹⁴ are none of them discharged by the death of a party.

§1368. Dissolution of corporation as discharge.

Courts differ as to whether the dissolution of a corporation discharges its contracts. A contract whereby A guarantees to B that a given corporation will pay dividends upon its corporate stock at a certain rate for seven years, is discharged as to the remaining period by the dissolution of such corporation at the end of five years.¹ Appointing a receiver for a mutual insurance company and adjudging it insolvent cancels all policies.² A contract by an insurance company with an agent has been held to be discharged by the dissolution of the corporation by the state as insolvent.³ On the other hand, a contract between a corporation which conducted a drug store to a person

⁸ *Bland v. Umstead*, 23 Pa. St. 316.

⁹ *Mutual Insurance. Kimmel v. Ins. Co.*, 161 Ill. 43; 43 N. E. 615; reversing 59 Ill. App. 532.

¹⁰ *Drummond v. Crane*, 159 Mass. 577; 38 Am. St. Rep. 460; 23 L. R. A. 707; 35 N. E. 90.

¹¹ *Cox v. Martin*, 75 Miss. 229; 65 Am. St. Rep. 604; 36 L. R. A. 800; 21 So. 611.

¹² *Stumpf's Appeal*, 116 Pa. St. 33; 8 Atl. 866.

¹³ *Henry v. Eddy*, 34 Ill. 508. (Though the creditor has died the pledgor must pay the debt in

order to obtain the collateral.)

¹⁴ *Hawkins v. Ball*, 18 B. Mon. (Ky.) 816; 68 Am. Dec. 755. (On the death of the creditor, the debtor if willing to do the work cannot be made to pay the money.)

¹ *Lorillard v. Clyde*, 142 N. Y. 456; 24 L. R. A. 113; 37 N. E. 489.

² *Boyd v. Fire Association*, 116 Wis. 155; 96 Am. St. Rep. 948; 61 L. R. A. 918; 90 N. W. 1086; 94 N. W. 171.

³ *People v. Ins. Co.*, 91 N. Y. 174. *Contra*, *Spader v. Mfg. Co.*, 47 N. J. Eq. 18; 20 Atl. 378.

who agreed to construct a soda-water fountain in such store at his expense, and to share the gross receipts with the corporation, is not discharged by a decree adjudging the corporation insolvent.⁴

§1369. Marriage as discharge.

The intermarriage of the parties to a contract discharged the contract at Common Law.¹ The reason for this rule is to be found in the result of marriage at Common Law. The husband could if he wished make his wife's choses in action, which would include her contract rights, his own. The operation of the doctrine of merger would therefore discharge the contract. Furthermore, at Common Law, husband and wife could not contract with each other. The co-operation of these two principles made marriage operate as a discharge. The effect of statutes giving to a married woman the power to bind herself by contract and making her property her own after marriage, depends upon the subject-matter of the contract. A contract between husband and wife for personal services is contrary to public policy,² and such a contract is merged and extinguished by the marriage of the parties.³ Other contracts are, under such statutes, according to the weight of authority, not discharged by marriage.⁴ An ante-nuptial contract is not invalidated by the intermarriage of the parties.⁵ An indebtedness in favor of the woman,⁶ or a judgment,⁷ or an indebtedness secured by mortgage,⁸ are none of them discharged by her intermarriage with the debtor, even under a statute authorizing the

⁴ *Bolles v. Crescent Drug, etc.,* 53 N. J. Eq. 614; 32 Atl. 1061.

¹ *Dillon v. Dillon* (Ky.), 69 S. W. 1099; *Chapman v. Kellogg*, 102 Mass. 246; *Burleigh v. Coffin*, 22 N. H. 118; 53 Am. Dec. 236; *Smiley v. Smiley*, 18 O. S. 543; and see *obiter*, *Flenner v. Flenner*, 29 Ind. 564; *Barton v. Barton*, 32 Md. 214.

² See § 426.

³ *In re Collister*, 153 N. Y. 294; 60 Am. St. Rep. 620; 47 N. E. 268.

Contra, *Carlton v. Carlton*, 72 Me. 115; 39 Am. Rep. 307.

⁴ *Henneger v. Lomas*, 145 Ind. 287; 32 L. R. A. 848; 44 N. E. 462; *Power v. Lester*, 23 N. Y. 527.

⁵ *Hudnall v. Ham*, 183 Ill. 486; 75 Am. St. Rep. 124; 48 L. R. A. 557; 56 N. E. 172.

⁶ *Barton v. Barton*, 32 Md. 214.

⁷ *Flenner v. Flenner*, 29 Ind. 564.

⁸ *Bemis v. Call*, 10 All. (Mass.) 512; *Power v. Lester*, 23 N. Y. 527.

husband to manage the wife's property.⁹ In some states, however, such a contract, as a debt secured by mortgage,¹⁰ is discharged by the intermarriage of the debtor and the creditor.

§1370. Destruction of specific subject-matter as discharge.

Under a contract which by the intent of the parties requires for its performance the continued existence of a specific subject-matter, the destruction of such subject-matter is an event not within the meaning of the contract, unless one of the parties has assumed the risk of its destruction; and such destruction therefore operates as a discharge where neither party has assumed such risk.¹ Thus a contract for the use of a music hall in the future, is discharged by the destruction of such building.² So a contract to ship a cargo by a specified steamer is discharged where such steamer is so injured by the perils of the sea, without the fault of the contractors, as to make it impossible for her to arrive within the time agreed upon.³ So a lease of apartments, which gives no interest in the soil, and amounts only to a license to use such apartments, is discharged by the destruction of the building in which such apartments are situated.⁴ This rule must be distinguished from the rule applying to the lease giving an interest in the soil and binding the lessee expressly to pay rent. Such lease is not discharged by the destruction of the building leased, in the absence of some specific provision therefor, or of some positive statute. A contract to perform labor upon a building belonging to another is dis-

⁹ *Wilson v. Wilson*, 36 Cal. 447; 95 Am. Dec. 194.

¹⁰ *Schilling v. Darmody*, 102 Tenn. 439; 73 Am. St. Rep. 892; 52 S. W. 291.

¹ *Taylor v. Caldwell*, 3 Best & S. 826; *Siegel v. Eaton, etc., Co.*, 165 Ill. 550; 46 N. E. 449; *Walker v. Tucker*, 70 Ill. 527; *Knight v. Bean*, 22 Me. 531; *Gilbert, etc., Co. v. Butler*, 146 Mass. 82; 15 N. E. 76; *Eliot National Bank v. Beal*, 141 Mass. 566; 6 N. E. 742; *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep.

415; *Powell v. Ry.*, 12 Or. 488; *Yerrington v. Greene*, 7 R. I. 589; 84 Am. Dec. 578.

² *Taylor v. Caldwell*, 3 Best. & S. 826.

³ *Nickoll v. Ashton* (1900), 2 Q. B. 298.

⁴ *Alexander v. Dorsey*, 12 Ga. 12; 56 Am. Dec. 443; *Womack v. McQuarry*, 28 Ind. 103; 92 Am. Dec. 306; *Stockwell v. Hunter*, 11 Met. 448; 45 Am. Dec. 220; *Graves v. Porden*, 29 Parb. (N. Y.) 100; *Winton v. Cornish*, 5 Ohio 477.

charged by the destruction of such building before such contract is completely performed,⁵ as a contract to repair a building.⁶ So the falling of the walls of a brick building discharges a contract to construct wood-work therein.⁷ The question of the right of the contractor to recover for the work done up to the time of such destruction is elsewhere discussed.⁸ This rule must be distinguished from the rule that one who agrees to construct and complete a building upon the land of another cannot recover if such building is destroyed before it has been accepted by the owner of the land.⁹ A contract to build a barn upon a foundation furnished by the owner is a contract for the construction of a complete building and not for work to be done upon the building of another, and hence is not discharged by the destruction of such barn.¹⁰ Under a contract to build an annex to an existing building the burning of the building and the annex operates as a discharge.¹¹ A contract to sell a specified chattel is discharged by the destruction of such chattel without the fault of the vendor before the title passes.¹² If the title to the chattel passes, the subsequent destruction does not discharge the vendee from his liability for the purchase price.¹³ Thus when A makes a quantity of lithographic posters for B under a contract by which B is to take them by a certain time and to pay for them then, and B does not take them or pay for them at such time, B is liable to A for the agreed price,

⁵ *Chicago Edison Co. v. Mfg. Co.*, 66 Ill. App. 222; *Butterfield v. Byron*, 153 Mass. 517; 25 Am. St. Rep. 654; 12 L. R. A. 571; 27 N. E. 667; *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415; *Weis v. Devlin*, 67 Tex. 507; 60 Am. Rep. 38; 3 S. W. 726.

⁶ *Lord v. Wheeler*, 1 Gray (Mass.) 282.

⁷ *Schwartz v. Saunders*, 46 Ill. 18.

⁸ See § 1600.

⁹ *Cutcliff v. McAnally*, 88 Ala. 507; 7 So. 331; *Commercial Fire Ins. Co. v. Ins. Co.*, 81 Ala. 320; 60 Am. Rep. 162; 8 So. 222; *School District v. Dauchy*, 25 Conn. 530;

68 Am. Dec. 371; *Adams v. Nichols*, 19 Pick. (Mass.) 275; 31 Am. Dec. 137; *Trenton Public Schools v. Bennett*, 27 N. J. L. 513; 72 Am. Dec. 373; *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349.

¹⁰ *Voght v. Hecker*, 118 Wis. 306; 95 N. W. 90.

¹¹ *Krause v. Crothersville*, — Ind. —; 70 N. E. 264.

¹² *Ontario, etc., Association v. Packing Co.*, 134 Cal. 21; 53 L. R. A. 681; 66 Pac. 28; *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415.

¹³ *Central Lithographing Co. v. Moore*, 75 Wis. 170; 17 Am. St. Rep. 186; 6 L. R. A. 788; 43 N. W. 1124.

and the fact that after such time the posters were destroyed by fire without A's fault does not discharge B from liability.¹⁴ So the destruction of a chattel bailed, without the fault of the bailee, discharges him from liability to redeliver the same.¹⁵ So a contract by which A, a planter, is to grind the sugar-cane from his plantation at his own sugar house and to have the syrup refined at B's refinery is discharged as to the remainder of the term of years for which it was to run by the destruction of the sugar house.¹⁶ A contract for the service of a stallion provided that if the first service should prove fruitless there should be the privilege of return free during the season. The first service proved fruitless and return was demanded during the season. In the meantime the stallion had died. This was held to discharge the liability of the owner of the stallion.¹⁷ The owner of the stallion was not bound to return the service fee as for failure of consideration.¹⁸ A covenant in an insurance contract requiring a surrender of the policy in order to change the beneficiary is held to be discharged if the policy is stolen without the fault of the owner¹⁹ or the beneficiary refuses to return the former certificate.²⁰

§1371. Partial destruction of subject-matter may be waived.

If the party prejudiced by the destruction of part of the subject-matter is willing to perform regardless of the fact of such destruction the party not prejudiced thereby cannot invoke such fact as a discharge. Thus destruction of buildings upon certain land after a contract for the sale thereof does not discharge the contract if the vendee is willing to carry out the

¹⁴ *Central Lithographing Co. v. Moore*, 75 Wis. 170; 17 Am. St. Rep. 186; 6 L. R. A. 788; 43 N. W. 1124.

¹⁵ *Stewart v. Stone*, 127 N. Y. 500; 14 L. R. A. 215; 28 N. E. 595.

¹⁶ *Romero v. Newman*, 50 La. Ann. 80; 23 So. 493.

¹⁷ *Pinkham v. Libby*, 93 Me. 575; 49 L. R. A. 693; 45 Atl. 823.

¹⁸ *Contra*, that such fee could un-

der similar circumstances be recovered. *Tatro v. Bailey*, 67 Vt. 73; 30 Atl. 685.

¹⁹ *Wilcox v. Assurance Society*, 173 N. Y. 50; 93 Am. St. Rep. 579; 65 N. E. 857.

²⁰ *Nally v. Nally*, 74 Ga. 669; 58 Am. Rep. 458; *Lahey v. Lahey*, 174 N. Y. 146; 95 Am. St. Rep. 554; 61 L. R. A. 791; 66 N. E. 670.

contract as if the buildings were still standing.¹ So a contract to remodel a building using old walls was partly performed when the walls fell. The owner restored the building to the condition in which it was just before the accident, and demanded that the contractor complete it. Such facts were held not to discharge the contractor.²

§1372. Destruction of property not specific subject-matter not discharge.

If the contract is not to deliver specific property, but to deliver property of a given kind and quality, which may be performed by the vendor's delivering any property of that kind and quality which he may select, the destruction of property which the vendor had acquired with the intention of tendering it in performance of his contract does not discharge him from liability.¹ Thus a contract to exchange flour for wheat is not discharged after the delivery of the wheat by the destruction of the mill with which the miller expected to grind the flour and in which the wheat was stored.² The destruction of property which is not the subject-matter of the contract does not discharge the contract, even though the tacit assumption of its continued existence was a material inducement, and, it may be, the controlling inducement by which one party was led to make the contract. Thus a contract of employment of a traveling salesman³ or a clerk⁴ is not discharged by the destruction of his employer's place of business. So a contract by which A agrees with B, C and D, the owners of different boats, to solicit and secure freight for their boats for the following season for a fixed salary, to be paid one third by each of the owners, is not discharged as to B by the destruction of his boat.⁵ So

¹ Hallett v. Parker, 68 N. H. 598;
39 Atl. 433.

² Chapman v. Beltz, 48 W. Va. 1;
35 S. E. 1013.

³ Anderson v. May, 50 Minn. 280;
36 Am. St. Rep. 642; 17 L. R. A.
555; 52 N. W. 530.

⁴ Martin v. Mill Co., 49 Mo. App.
23.

⁵ Turner v. Goldsmith (1891),
1 Q. B. 544.

⁴ Madden v. Jacobs, 52 La. Ann.
2107; 50 L. R. A. 827; 28 So. 225.

⁵ Nicol v. Fitch, 115 Mich. 15;
69 Am. St. Rep. 542; 72 N. W.
988.

a contract to deliver iron-work is not discharged by the accidental burning of vendor's mill at which he had expected to manufacture such iron-work.⁶ So a contract employing a teacher is not discharged by the destruction of the school-house in which it was expected that the school would be kept.⁷ So a contract to furnish electricity "for the purpose of operating his machinery," "in his business as a miller," is not discharged by the destruction of the mill in which it was expected that the electricity would be used.⁸

§1373. Impossibility by subsequent act of law.

An impossibility of performance, which is created by a subsequent valid act of law, operates as a discharge of a contract.¹ Subsequent legislation which impairs the obligation of a contract is ordinarily unconstitutional. Under the exercise of the police power, however, the legislature may make illegal the performance of contracts already entered into.² Thus a contract to transport natural gas from Indiana to Chicago, Illinois, to perform which a pressure of 325 pounds to the square inch is necessary, is discharged by subsequent valid police regulations of Indiana, forbidding gas to be transported at a pressure greater than 300 pounds.³ A contract to construct a railroad on a given route is discharged by a subsequent valid amendment to its charter, the right to make which is reserved by statute,

⁶ Booth v. Rolling Mill Co., 60 N. Y. 487.

⁷ Corn v. Board, etc., 39 Ill. App. 446; School Directors v. Crews, 23 Ill. App. 367; Charleston School Township v. Hay, 74 Ind. 127; Smith v. School District, 69 Mich. 589; 37 N. W. 567; Cashen v. School District, 50 Vt. 30. *Contra*, Hall v. School District, 24 Mo. App. 213, which is subsequently explained in Rudy v. School District, 30 Mo. App. 113, as being a contract to conduct a school in the specific building which was burned.

⁸ Ontario, etc., Co. v. Galloway Co., 5 Ont. Law Rep. 419.

¹ Ottawa v. Ry., 1 Ont. Law Rep. 377; Macon, etc., R. R. v. Gibson, 85 Ga. 1; 21 Am. St. Rep. 135; 11 S. E. 442. Whether legislation which prevents performance of prior contracts is valid, see Ch. LXXXI.

² Jamieson v. Oil Co., 128 Ind. 555; 12 L. R. A. 652; 28 N. E. 76.

³ Jamieson v. Oil Co., 128 Ind. 555; 12 L. R. A. 652; 28 N. E. 76.

altering the location of the road.⁴ A contract entered into by a corporation is discharged by the appointment of a receiver of the corporation, and an injunction against its further transaction of business,⁵ at least where the adversary party elects to treat such facts as discharging him from liability. Thus where A agrees with B to turn over to a bank certain notes and accounts received from B in satisfaction of a debt due to the bank from B, and the bank has refused to accept them, but subsequently consents, A is excused from complying with such demand by the appointment of a receiver under order of the court for such notes and accounts.⁶ A contract between two street railway companies, that neither will reduce fares below the amount authorized by statute of a certain date, is discharged when the legislature reduces the fare.⁷ The appointment of a receiver of a corporation, together with an injunction restraining the corporation from collecting and paying out money, does not discharge a contract by the corporation with its general manager prior to the forfeiture of the charter of the corporation.⁸ A contract whereby A agrees with a school district to remove a schoolhouse is excused where the school district and its agent are enjoined from prosecuting the work, and the injunction is not dissolved soon enough to enable the contractor to resume the work under the contract.⁹ The order of a public official, if within his legal powers, may operate as a discharge of a contract between other persons. Thus a contract between A and B, whereby A is to clear off standing timber on a specified highway, is discharged by an order of the county commissioners who propose to change the line of the remaining part of the road.¹⁰ No liability exists where a steamboat leaves before schedule time, but the government inspector has refused to allow more persons to go on board because it has already all

⁴ Macon, etc, R. R. v. Gibson, 85 Ga. 1; 21 Am. St. Rep. 135; 11 S. E. 442.

⁵ Malcomson v. Wappoo Mills, 88 Fed. 680.

⁶ Howell v. Hough, 46 Kan. 152; 26 Pac. 436.

⁷ Buffalo, etc., R. R. v. R. R.,

111 N. Y. 132; 2 L. R. A. 384; 19 N. E. 63.

⁸ Rosenbaum v. Credit System Co., 61 N. J. L. 543; 40 Atl. 591.

⁹ Burkhardt v. School Township, 9 S. D. 315; 69 N. W. 16.

¹⁰ Burns v. Koochiching, 63 Minn. 239; 71 N. W. 26.

that its license permits it to carry.¹¹ After a contract of insurance was entered into the statutes required a more substantial and expensive structure than that existing. The building insured was thereafter destroyed by fire. The liability of the insurance company under the policy was held not to be limited to the cost of replacing the structure described in the survey.¹² A contract to convey realty by "a good and clear title free from all encumbrances" was held not to be discharged by the city's taking part of the realty contracted for to widen a street, after the contract and before the conveyance.¹³ A contract of a surety on a bond for the appearance of the accused is not, after his default, discharged by the act of the governor in pardoning him.¹⁴ An express stipulation against liability for non-performance if the contractor was "lawfully restrained" relieves a canal company for liability for failure to deliver water where the canal was filled in by the county supervisors.¹⁵ If the law stops performance for a limited time, this operates as a temporary suspension of the contract, but not as a discharge.¹⁶

§1374. Writ obtained by private litigant not act of law.

If A enters into a contract with B which is valid when made, the fact that X by proceedings in injunction prevents A from performing such contract does not discharge A from liability to B for breach.¹ Thus a contract to deliver water

¹¹ *Hughson v. Steamboat Co.*, 181 Mass. 325; 58 L. R. A. 432; 64 N. E. 74.

¹² *Pennsylvania Co. v. Contributionship*, 201 Pa. St. 497; 57 L. R. A. 510; 51 Atl. 351.

¹³ *Kares v. Covell*, 180 Mass. 206; 91 Am. St. Rep. 271; 62 N. E. 244. (The vendee is not obliged to accept the realty at the contract price. He may either rescind the sale for the breach or recoup damages.)

¹⁴ *Dale v. Commonwealth*, 101 Ky. 612; 38 L. R. A. 808; 42 S. W. 93.

¹⁵ *Fresno Milling Co. v. Irriga-*

tion Co., 126 Cal. 640; 59 Pac. 140.

¹⁶ *School District v. Howard*, (Neb.); 98 N. W. 666.

¹ *Sample v. Irrigation Co.*, 129 Cal. 222; 61 Pac. 1085; *Whittemore v. Sills*, 76 Mo. App. 248. "No case has been cited in which it has been held that interference by a writ sued out by a private litigant will excuse performance of a contract although it may deprive the contract of the means of performance. It is not prevention by operation of law. It is the act of an individual, and not of the government." *Klauber v. Street-Car Co.*,

through an irrigation ditch² or to construct a sewer within a 'given time'³ are none of them discharged by an injunction obtained by a third person against the promisor and restraining him from doing the acts which he has promised to do. This principle must be distinguished from the principle that if a right to act within a specified time is given by the law, the time during which such party was enjoined from acting must, at least as against the party on whose application the injunction issued be omitted from computation in determining whether the time within which the right can be exercised has elapsed. Thus time during which one was enjoined from issuing execution must be deducted from the time between the rendition of judgment and the issuing of execution.⁴ So the time during which one was restrained cannot be counted in determining whether the time within which an appeal may be perfected has elapsed.⁵

§1375. Event which could have been anticipated not impossibility.— Climatic conditions.

An event which should have been foreseen by the promisor as a reasonable man cannot be relied upon by him as a subsequent impossibility amounting to a discharge. Thus the fact that floods in western streams cause a change in the channel cannot operate to discharge a contract for driving logs down to a slough which has once been filled up by a flood.¹ In this case the contract was not rendered absolutely impossible, since at some expense the promisor could make use of another slough for the purpose of performing his contract. So the fact that the Ohio River is frozen in midwinter,² or that the Yukon is too low for navigation by steamboat at certain stages of the

95 Cal. 353, 357; 30 Pac. 555; quoted in *Sample v. Irrigation Co.*, 129 Cal. 222, 227; 61 Pac. 1085.

² *Sample v. Irrigation Co.*, 129 Cal. 222; 61 Pac. 1085.

³ *Whittemore v. Sills*, 76 Mo. App. 248.

⁴ *Wakefield v. Brown*, 38 Minn.

361; 8 Am. St. Rep. 671; 37 N. W. 788.

⁵ *Williams v. Pouns*, 48 Tex. 141.

¹ *Mississippi River Logging Co. v. Robson*, 69 Fed. 773; 16 C. C. A. 400; affirming, 61 Fed. 893.

² *Engster v. West*, 35 La. App. 119; 48 Am. Rep. 232.

year,³ are events which should have been foreseen, and cannot operate to discharge a contract for transportation. A contract to raise and deliver a certain quantity of beans, not to be raised on any specific tract of land, is not excused by an unexpected early frost which destroyed the crop which the promisor was raising with the intention of delivering it when grown in completion of his contract.⁴ However, a contract to raise a certain kind of crop upon a specific tract of land has been held to be excused because of the failure of such crop due to a blight⁵ or to unusual climatic conditions.⁶ Such facts have been treated as a discharge even where the contract specified the minimum quantity which the promisor agreed to raise and deliver.⁷ One who agrees to complete a building,⁸ or grade a street,⁹ by a certain time, is not excused from liability for delay caused by bad weather, at least if such weather might have been anticipated as a possible contingency. So one who agrees to harvest a crop for another, to begin work not later than a given date, is liable for damages caused by high wind which might reasonably have been anticipated as possible, and which occurred during the week after the time fixed for commencing work in which the contractor delayed its commencement.¹⁰ So one who agrees to deliver certain logs by a given time if the logging season permits, is not excused by climatic conditions which are not uncommon, although more unfavorable to work than usual.¹¹ A rise in a stream, threatening promisee's building, does not discharge a contract whereby promisor is to dig a ditch or canal, so that the promisee can stop the work without any

³ *Smith v. Trading Co.*, 20 Wash. 580; 44 L. R. A. 557; 56 Pac. 372.

⁴ *Anderson v. May*, 50 Minn. 280; 36 Am. St. Rep. 642; 17 L. R. A. 555; 52 N. W. 530.

⁵ *Howell v. Coupland*, L. R. 9 Q. B. 462.

⁶ *Ontario, etc., Association v. Packing Co.*, 134 Cal. 21; 53 L. R. A. 681; 66 Pac. 28.

⁷ *Ontario, etc., Association v. Packing Co.*, 134 Cal. 21; 53 L. R. A. 681; 66 Pac. 28.

⁸ *Cannon v. Hunt*, 113 Ga. 501; 38 S. E. 983; *Cochran v. Ry.*, 131 Mo. 607; 33 S. W. 177; *Ward v. Building Co.*, 125 N. Y. 230; 26 N. E. 256; *Reichenbach v. Sage*, 13 Wash. 364; 52 Am. St. Rep. 51; 43 Pac. 354.

⁹ *McQuiddy v. Brannock*, 70 Mo. App. 535.

¹⁰ *Holt Mfg. Co. v. Thornton*, 136 Cal. 232; 68 Pac. 708.

¹¹ *Godkin v. Monahan*, 83 Fed. 116; 27 C. C. A. 410.

liability for that which has been done already.¹² A lessor agreed to repair a dam within ten days after the water has fallen to an average winter stage. The lessor was held liable for failure to begin repairs at such time, even though it was expensive to make such repairs then, and a subsequent rise of the stream made it impossible to repair at a later time.¹³ A bought land of an improvement company, which company agreed to run cars to such land from the town every half hour "as such street railroads are usually run;" or, in default of such operation, to take back the land and pay certain damages to the vendee. A heavy snowfall prevented the running of such cars for some time, though the railroad company used snow plows, and made every effort to clear the tracks. The cars were run as well and as regularly as cars on similar roads in the vicinity. This was held not to give the vendee the right to rescind the contract.¹⁴ An unexpected flood has been held not to excuse delay in completing a bridge.¹⁵

§1376. Epidemics.

A contract whereby a teacher is employed is not discharged by the act of the board in closing the schools on account of an epidemic of smallpox,¹ or diphtheria,² so as to prevent the teacher from recovering for the period of employment.

§1377. Difficulty of performance not impossibility.

Mere difficulty of performance is not such impossibility as operates as discharge of a contract.¹ Thus a provision in a

¹² Vicksburg Water Supply Co. v. Gorman, 70 Miss. 360; 11 So. 680.

¹³ Pengra v. Wheeler, 24 Or. 532; 21 L. R. A. 726; 34 Pac. 354.

¹⁴ Buffalo, etc., Co. v. Improvement Co., 165 N. Y. 247; 51 L. R. A. 951; 59 N. E. 5.

¹⁵ Phoenix Bridge Co. v. United States, 38 Ct. Cl. 492.

¹ Dewey v. School District, 43 Mich. 480; 38 Am. Rep. 206; 5 N. W. 646; Randolph v. Sanders, 22

Tex. Civ. App. 331; 54 S. W. 621; McKay v. Barnett, 21 Utah 239; 50 L. R. A. 371; 60 Pac. 1100.

² School Town v. Gray, 10 Ind. App. 428; 37 N. E. 1059; Libby v. Douglas, 175 Mass. 128; 55 N. E. 808.

¹ Blight v. Page, 3 Bos. & P. 295; Ford v. Cotesworth, L. R. 4 Q. B. 127; Brecknock v. Pritchard, 6 T. R. 750; United States v. Gleason, 175 U. S. 588; Steele v. Buck,

policy of fire insurance requiring proof of loss in sixty days, and action to be brought in one year is not discharged by the fact that the loss occurred after the death of the insured; and that owing to a dispute about the probate of the will an executor was not appointed or proof of loss made for two years after the loss, since a special administrator might have been appointed to make proof of loss.² So under a contract to fill an order for potatoes "immediately," delay is not excused by the fact that it took eight days to collect the potatoes.³ So the fact that the contractor is himself unable to perform the contract is not a discharge.⁴ Thus under a contract containing a proviso "unless providentially hindered," a mere breakage of machinery does not operate as a discharge.⁵ So a strike in vendor's factory does not discharge a contract to sell and deliver sheet-iron not stipulated to be of the vendor's manufacture.⁶ So the fact that the contractor is unable to complete his contract through lack of funds is no discharge. This is true even if the contractor is unable to raise funds upon stocks and bonds of the company for which he is working, which he has taken under his contract as his sole compensation, even if his inability to raise such funds is due to the failure of such company to keep its credit good by meeting its obligations.⁷ A agreed to fur-

61 Ill. 343; 14 Am. Rep. 60; *Union v. Smith*, 39 Ia. 9; 18 Am. Rep. 39; *Boyle v. Canal Co.*, 22 Pick. (Mass.) 381; 33 Am. Dec. 749; *Adams v. Nichols*, 19 Pick. (Mass.) 275; 31 Am. Dec. 137; *Anderson v. May*, 50 Minn. 280; 36 Am. St. Rep. 642; 17 L. R. A. 555; 52 N. W. 530; *Leavitt v. Dover*, 67 N. H. 94; 68 Am. St. Rep. 640; 32 Atl. 156; *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712; 17 Atl. 93; *Prospect, etc., R. R. v. R. R.*, 144 N. Y. 152; 26 L. R. A. 610; 39 N. E. 17; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500; 32 Am. Rep. 518; *Janes v. Scott*, 59 Pa. St. 178; 98 Am. Dec. 328.

² *Matthews v. Ins. Co.*, 154 N. Y. 449; 61 Am. St. Rep. 627; 39 L. R. A. 433; 48 N. E. 751.

³ *Woods v. Miller*, 55 Ia. 168; 39 Am. Rep. 170; 7 N. W. 484.

⁴ *Day v. Jeffords*, 102 Ga. 714; 29 S. E. 591; *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899; *Wood v. Boney* (N. J. Eq.), 21 Atl. 574; *Wheeler v. Connecticut, etc., Ins. Co.*, 82 N. Y. 543; 37 Am. Rep. 594; *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349; *Harmony v. Bingham*, 12 N. Y. 99; 62 Am. Dec. 142.

⁵ *Day v. Jeffords*, 102 Ga. 714; 29 S. E. 591.

⁶ *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899.

⁷ *Wood v. Boney* (N. J. Eq.), 21 Atl. 574.

nish water to B. The pressure was not kept up, and B's building was lost by fire by reason thereof. A's excuse for failing to keep up pressure was that without his fault a water-pipe had broken under a river in which the tide ebbed and flowed, and that the pipe could be repaired only when the tide was out. These facts were not held to discharge A.⁸ The act of the law which merely makes the performance of the contract more difficult and expensive than had been anticipated does not operate as a discharge.⁹ Thus a foreign corporation which operates a railroad is not discharged by a subsequent change of statute forbidding a foreign corporation to operate a railroad without first becoming "a body corporate under the laws of this commonwealth," since such corporation can re-incorporate in such state.¹⁰ So a contract whereby A agrees to furnish a certain sum of money to compromise with B's creditors in consideration of B's transferring to A B's stock of goods, is not discharged because A is unable to obtain the dissolution of an attachment theretofore levied on such goods.¹¹

§1378. Expense of performance not impossibility.

The fact that performance proves to be more expensive than was anticipated does not constitute impossibility so as to avoid the contract.¹ So the fact that the contract has proved to be unprofitable does not of itself amount to a discharge.² Thus a contract to manufacture and sell certain patented articles and to pay the patentee a royalty therefor, a certain amount being

⁸ *Middlesex Water Co. v. Whit-
ing Co.*, 64 N. J. L. 240; 81 Am.
St. Rep. 467; 49 L. R. A. 572; 45
Atl. 692.

⁹ *Newport News, etc., Co. v.
Brick Co.*, 109 Ky. 408; 59 S. W.
332.

¹⁰ *Newport News, etc., Co. v.
Brick Co.*, 109 Ky. 408; 59 S. W.
332.

¹¹ *Banewur v. Levenson*, 171
Mass. 1; 50 N. E. 10.

¹ *Cornell v. Rodabaugh*, 117 Ia.

287; 94 Am. St. Rep. 298; 90 N.
W. 599.

² *Bates Machine Co. v. Iron
Works*, 113 Ky. 372; 68 S. W. 423;
Stees v. Leonard, 20 Minn. 494;
Leavitt v. Dover, 67 N. H. 94; 68
Am. St. Rep. 640; 32 Atl. 156;
Prospect, etc., R. R. v. R. R., 144
N. Y. 152; 26 L. R. A. 61; 39 N.
E. 17; *Hanthorn v. Quinn*, 42 Or.
1; 69 Pac. 817; *Pengra v. Wheeler*,
24 Or. 532; 21 L. R. A. 726; 34
Pac. 354; *Beecher v. Stein*, 139 Pa.
St. 570; 21 Atl. 79.

guaranteed to him, is not discharged by the fact that none of such articles have been sold, and that none can be sold except at a loss.³ So a contract between a steam railroad running to Coney Island and a street railroad whose motive power then was horses, and which could not then run to Coney Island in competition with the steam railroad, by which on consideration of the right to use the tracks of the steam railroad the street railroad is to run its cars to the other's depot, is not discharged by the fact that the street railroad subsequently adopts electricity as a motive power and is able to compete with the steam railroad.⁴ So a contract giving to A the right to maintain an outside stairway from his building over B's land is not discharged by the fact that such land since then has greatly increased in value.⁵ So a contract to procure a right of way excepting the right to maintain a draw-bridge is not discharged by the fact that the railroad company is unable to obtain a charter for such draw-bridge, and that the entire road must therefore be abandoned. The party who has obtained the right of way is entitled to the compensation agreed upon.⁶ The fact that it proves to have been imprudent to enter into the contract does not operate as a discharge.⁷ Thus a contract to furnish good pasture for cattle and an abundant supply of fresh water is not discharged because imprudent.⁸ So if A agrees to sell to B machines to cut wire nails, A is not discharged from such contract because he finds that the machines made by him for that purpose, which he had expected to deliver in performance of the contract, would not make nails rapidly enough to be profitable, and that such defect cannot be remedied. He can perform the contract by delivering machines of another make.⁹ So subsequent facts which make performance less profitable than was anticipated do not operate

³ Beecher v. Stein, 139 Pa. St. 570; 21 Atl. 79. 21 Am. St. Rep. 110; 22 Atl. 300.

⁴ Prospect Park, etc., R. R. v. R. R., 144 N. Y. 152; 26 L. R. A. 610; 39 N. E. 17. 107 Ia. 231; 77 N. W. 1026.

⁵ Joseph v. Wild, 146 Ind. 249; 8 Ware Cattle Co. v. Anderson, 107 Ia. 231; 77 N. W. 1026.

⁶ Stanton v. Ry., 59 Conn. 272;

⁹ Bates Machine Co. v. Iron Works, 113 Ky. 372; 68 S. W. 423.

as a discharge.¹⁰ Thus a contract to furnish a book for publication by a corporation is not discharged by the fact that public disgrace has attached to the name of the former president and manager of the corporation, whose name the corporation bears.¹¹

§1379. Insolvency not discharge.

Insolvency of a party to a contract does not operate as a discharge of the insolvent¹ nor of the adversary party.² Insolvency proceedings against a trust company do not discharge a contract where it has agreed to pay the expenses of a certain trust, but when the trust company is disabled from carrying out its contract by such proceedings the contract is broken.³ A agreed to build a steamboat for B. Before the time for completing the boat A became insolvent and made an assignment for the benefit of his creditors. This was held not to discharge B, and B's act in taking possession of the uncompleted boat was held to be either a trespass or an acceptance of the boat, making him liable for the contract price, at the election of A's assignee.⁴ A husband and wife entered into a contract adjusting their property rights. This contract was by consent carried into a decree for alimony. It was held that a subsequent unfavorable change in the husband's financial condition could not discharge the contract, and hence under such circumstances the court could not modify the decree awarding \$150 a month.⁵ The bankruptcy of the insured does not render it impossible for him to prepare and transmit proofs of loss and hence does not

¹⁰ C. F. Jewett Publishing Co. v. Butler, 159 Mass. 517; 22 L. R. A. 253; 34 N. E. 1087; Prospect Park etc., Ry. v. Ry., 144 N. Y. 152; 26 L. R. A. 610; 39 N. E. 17.

¹¹ C. F. Jewett Publishing Co. v. Butler, 159 Mass. 517; 22 L. R. A. 253; 34 N. E. 1087.

¹ Contract between life insurance company and agent. Lewis v. Ins. Co., 61 Mo. 534. Compare the different principle involved under facts partially similar in § 1368.

Building contract. McConnell v. Hewes, 50 W. Va. 33; 40 S. E. 436

² Vandegrift v. Engineering Co., 161 N. Y. 435; 48 L. B. A. 685; 55 N. E. 941.

³ Bank Commissioners v. Trust Co., 69 N. H. 621; 44 Atl. 130.

⁴ Vandegrift v. Engineering Co., 161 N. Y. 435; 48 L. R. A. 685; 55 N. E. 941.

⁵ Henderson v. Henderson, 37 Or. 141; 82 Am. St. Rep. 741; 48 L. R. A. 766; 60 Pac. 597; 61 Pac. 136.

discharge a covenant on his part so to do.⁶ Under a contract for sale on credit, delivery to be made in the future, the solvency of the vendee is held to be an implied condition of the contract. The insolvency of the vendee eliminates the provision for credit, therefore, but leaves the rest of the contract in force.⁷ A different principle applies to contracts for payment out of a specific fund. If the fund is insufficient, the contract is fully performed by paying the entire fund. Thus if the fund raised for the payment of teachers is insufficient, the school district is not liable.⁸ While mere insolvency of one party does not discharge the other, the fact of his giving notice of his insolvency to the other may be equivalent to a notice that he will not perform⁹ and may amount to breach.¹⁰

§1380. Impossibility of one of several methods of performance not discharge.

One who agrees to do a specific act which can, without violating the terms of the contract, be performed in one of two ways, is not discharged from his contract because one of the two methods of performance becomes impossible.¹ Thus one who agrees to remove oats within a certain time is not discharged by the fact that it is impossible to remove them by boat where they could have been removed in some other way.² So where A agrees to remove, reconstruct, and rebuild a schoolhouse, and under the terms of the contract the house can be removed, either as a complete building or can be torn down and the materials used to rebuild another schoolhouse, the fact that the

⁶ Fuller v. Ins. Co., 184 Mass. 12; 67 N. E. 879.

⁷ Pratt v. Mfg. Co., 115 Wis. 648; 92 N. W. 368.

⁸ Morley v. Power, 10 Lea (Tenn.) 219. Compare Rudy v. School District, 30 Mo. App. 113, where it was held that the defense that not enough had been paid into the treasury was insufficient as the only defense was that not enough funds were provided.

⁹ Notice by vendee in an execu-

tory contract to vendor. Hobbs v. Brick Co., 157 Mass. 109; 31 N. E. 756.

¹⁰ See § 1436 *et seq.*

¹ Board of Education v. Townsend, 63 O. S. 514; 52 L. R. A. 868; 59 N. E. 223; reversing, 15 Ohio C. C. 674.

² Adams v. Ames, 19 Wash. 425; 53 Pac. 546 (where the contract contained a proviso "wind, tide and other acts of God permitting").

house is blown down by a storm and cannot be removed as a complete building does not discharge the contract.³

**§1381. Positive contract to do certain act or pay damages.—
Impossibility of doing act not discharge.**

If a party to a contract enters into a positive and absolute undertaking to do certain things, in which, by express terms or necessary implication, he binds himself to pay damages in the event that he does not do what he agreed to do, subsequent impossibility of performance does not operate as a discharge.¹ Thus if A makes a positive and unqualified contract to remove and rebuild a schoolhouse, the fact that such house is blown down by a wind storm does not discharge A from liability.² So

³ Board of Education v. Townsend, 63 O. S. 514; 52 L. R. A. 868; 59 N. E. 223; reversing, 15 Ohio C. C. 674.

¹ Ashmore v. Cox (1899), 1 Q. B. 436; School Dist. v. Dauchy, 25 Conn. 530; 68 Am. Dec. 371; Summers v. Hibbard, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899; Steele v. Buck, 61 Ill. 343; 14 Am. Rep. 60; Anderson v. May, 50 Minn. 280; 36 Am. St. Rep. 642; 17 L. R. A. 555; 52 N. W. 530; Cowley v. Davidson, 13 Minn. 92; Wilkinson v. Insurance Co., 72 N. Y. 499; 28 Am. Rep. 166; Board of Education v. Townsend, 63 O. S. 514; 52 L. R. A. 868; 59 N. E. 223. "A party may by an absolute contract bind himself or itself to perform things which subsequently became impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where

the event is of such a character that it cannot be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens." Chicago, etc., Ry. v. Hoyt, 149 U. S. 1, 14. "Where a party has expressly undertaken without qualification to do anything not naturally or necessarily impossible under all circumstances and he does not do it, he must make compensation in damages, though the performance was rendered impracticable or even impossible by some unforeseen cause over which he had no control but against which he might have provided in his contract." Wilmington Transportation Co. v. O'Neil, 98 Cal. 1, 5; 32 Pac. 705; quoted in Sample v. Irrigation Co., 129 Cal. 222, 228; 61 Pac. 1085.

² Board of Education v. Townsend, 63 O. S. 514; 52 L. R. A. 868; 59 N. E. 223.

a contract to construct a wind-mill and dig a well, which the contractor agrees shall furnish a good water supply for stock, is not discharged by the fact that the season in which the breach occurred was an unusually dry one.³ A contract by which a bank which holds certain stock as collateral for a note agrees to secure an assignment of such stock as security for another note, is not discharged by the fact that the conditions which attached to the original deposit of the stock, but were not disclosed by the bank, prevent the performance of such contract.⁴ A sold to B some land in which a building was situated, and agreed to keep the building insured to protect B's interest. B was to pay for the land in installments, and to have a deed when the land was paid for. Subsequently the building was destroyed by fire, and A collected the insurance, the amount of which exceeded the amount then due from B. B demanded a deed for the property and the payment of the difference between the amount of the insurance received by A and the amount still due from B to A. It was held that inasmuch as the contract provided for the contingency of the destruction that the destruction of the building did not operate as a discharge.⁵ If A contracts with B to do certain things, the fact that A has a contract with X, which he expects X to perform, and by means of which he expects to be able to perform his contract with B, and the further fact that thereafter X breaks his contract with A, do not amount to such impossibility as to discharge A from his contract with B.⁶ Thus A, a contractor, agreed to build a house for B, and by the terms of the contract B was to supply all the materials as needed. A employed X to do certain work upon such building, and X knew of A's contract with B. B's failure to perform, causing A to break his contract with X, does not operate as a discharge.⁷ A contractor who has an opportunity to examine specifications, and

³ Wernli v. Collins, 87 Ia. 548;
54 N. W. 365.

⁴ First National Bank v. Park.
117 Ia. 552; 91 N. W. 826.

⁵ Allyn v. Allyn, 154 Mass. 570;
28 N. E. 779.

⁶ Perine v. Standfield, 107 Mich.
553; 65 N. W. 541.

⁷ Perine v. Standfield, 107 Mich.
553; 65 N. W. 541.

who makes an absolute contract to perform certain work under them, at a certain price, is not discharged from liability because he is unable to perform the contract by reason of some defect in the specifications.⁸ Thus a contract to construct a wooden sewer is not discharged because the specifications require a turn which it is impracticable for the contractor to make.⁹ One who agrees to construct a well according to certain specifications cannot recover for damages caused by the caving in of the well, due to an inherent defect in the curb specified by the contract.¹⁰

⁸ *Leavitt v. Dover*, 67 N. H. Wis. 55; 75 N. W. 1014.

94; 68 Am. St. Rep. 640; 32 Atl. 156.

¹⁰ *Leavitt v. Dover*, 67 N. H. 94; 68 Am. St. Rep. 640; 32 Atl. 156.

⁹ *Burnham v. Milwaukee*, 100

CHAPTER LXVI.

PERFORMANCE.

§1382. Nature of performance.

Performance of a contract consists in doing the thing agreed to be done. A contract may be performed by both parties thereto; in which case it is said to be fully executed. The use of this word is inadvisable, since "executed" is used and with more accuracy, in speaking of the formation of a contract. A contract may be performed by one party, but not by the other. Such a contract is said to be executed on one side and executory on the other. The name "unilateral" is also given to contracts of this class. The use of this word is undesirable.

§1383. Effects of performance.

Performance by one party has two results: (1) It discharges the party so performing from further liability under the contract.¹ Thus a common carrier who contracts only to deliver to the next carrier discharges its liability by so doing, no matter what the fate of the goods shipped.² (2) Performance gives to the party performing the right to enforce the contract against the adversary party who has not fully performed, when performance from him is due. If the contract has not already been broken by the adversary party so as to discharge it, the party performing may perform without the consent or acquiescence therein of such adversary party.³ Whether a contract has been performed or not is a question of fact.⁴

¹ *Courteen v. Kanawha Dispatch*, 110 Wis. 610; 55 L. R. A. 182; 86 N. W. 176.

² *Courteen v. Kanawha Dispatch*, 110 Wis. 610; 55 L. R. A. 182; 86 N. W. 176.

³ *Central Coal & Coke Co. v. Good*, 120 Fed. 793.

⁴ *Lincoln v. Orthwein*, 120 Fed. 880; *United States, etc., Co. v. Sprinkler Co.*, 84 Mo. App. 204; *Charley v. Potthof*, 118 Wis. 258; 95 N. W. 124.

§1384. Performance not dependent on benefit to adversary party.

The right to enforce the contract against the party who has not performed is not affected by the fact that performance has not benefited him as much as he had expected.¹ The question in such cases is whether the party performing a valid contract has done what he agreed to do, and not whether the adversary party has made a wise bargain, or received a financial benefit therefrom. The risk of loss is one which every party to a contract must take for himself. Thus if one agrees to pay money to a third person for the use of the adversary party² or to deposit money in a specified bank³ and he does what he agrees to do, he is discharged from liability even if the adversary party is unable to enforce payment from such third person or such bank. So one who agrees to bring an action and does so discharges his liability, although a hearing on the merits is delayed longer than was expected.⁴ So one who agrees to apply for certain lands to the board of land commissioners and who does so is discharged, although his application is rejected and he takes no appeal, if none was contracted for.⁵ So one who performs a building contract can recover, without reference to the actual value of the building constructed, even if it is worth but a third of the contract price.⁶ So if a building is constructed in accordance with the terms of the contract the contractor can recover, even though owing to defects in the specifications the performance does not accomplish the results expected by the owner.⁷

¹ Thompson v. Searcy, 57 Fed. 1030; May Mantel Co. v. Blowpipe Co., 93 Ga. 778; 21 S. E. 142; Sully v. Pratt, 106 La. 601; 31 So. 161; Knoch v. Bernuth, 145 N. Y. 643; 40 N. E. 398; Wallace v. Williams (Tenn.), 69 S. W. 267; Schwede v. Hemrich, 29 Wash. 124; 69 Pac. 643; Perkins v. Bank, 17 Wash. 100; 49 Pac. 241.

² Knoch v. Bernuth, 145 N. Y. 643; 40 N. E. 398.

³ Perkins v. Bank, 17 Wash. 100; 49 Pac. 241.

⁴ Wallace v. Williams (Tenn.),

69 S. W. 267. (A contract by lessor with lessee to bring an action to evict a third person from adjoining premises of lessor's.)

⁵ Schwede v. Hemrich, 29 Wash. 124; 69 Pac. 643.

⁶ Thompson v. Searcy County, 57 Fed. 1030; 6 C. C. A. 674.

⁷ Carroll County v. O'Connor, 137 Ind. 622; 35 N. E. 1006; 37 N. E. 16; Schliess v. Grand Rapids, 131 Mich. 52; 90 N. W. 700; MacKnight, etc., Co. v. New York, 160 N. Y. 72; 54 N. E. 661; Harlow v. Homestead, 194 Pa. St. 57; 45 Atl.

A contractor who under protest erects the foundation for a bridge as required by the proper officials can recover, although it subsequently settles due to a defective construction.⁸ So one who constructs a wall in freezing weather when required to do so by the owner, and conforms to plans and specifications is not liable for defects due to the freezing of the mortar if he has not guaranteed that the wall will stand the weather.⁹ So one who furnishes machinery in accordance with his contract may recover, though owing to the defective working of appliances furnished by the other party the expected result is not obtained.¹⁰ Thus an architect may recover for plans furnished in accordance with his contract, though the owner makes no use of them and receives no benefit therefrom.¹¹ If the contractor guarantees certain results from his performance under certain specifications he is liable if such results are not produced, even if such failure is due to inherent defects in the specifications.¹² Wherever possible the courts prefer to construe such guaranty as conditioned on the possibility of producing such results under such specifications. Thus a contract to make a watertight cellar,¹³ or reservoir,¹⁴ or roof,¹⁵ has been held to be performed, though owing to defects in the plans furnished by the owner such result was not obtained. So a contract to dig a well not specifying the flow of water to be obtained, is performed by obtaining a flow even if insufficient for the needs of the owner; and the contractor can recover.¹⁶ Thus if "deep strata water" is to be obtained and is obtained in the required

87; *Fairman v. Ford*, 70 Vt. 111; 39 Atl. 748.

⁸ *Carroll County v. O'Connor*, 137 Ind. 622; 35 N. E. 1006; 37 N. E. 16.

⁹ *Schliess v. Grand Rapids*, 131 Mich. 52; 90 N. W. 700.

¹⁰ *May Mantel Co. v. Blowpipe Co.*, 93 Ga. 778; 21 S. E. 142. (A pipe furnished by A to carry off dust and shavings from B's machinery, which fails to work because the fan furnished by B and set by A is defective.)

¹¹ *Sully v. Pratt*, 106 La. 601; 31 So. 161.

¹² *Construction of ice plant. Bryson v. McCone*, 121 Cal. 153; 53 Pac. 637.

¹³ *MacKnight, etc., Co. v. New York*, 160 N. Y. 72; 54 N. Y. 661.

¹⁴ *Harlow v. Homestead*, 194 Pa. St. 57; 45 Atl. 87.

¹⁵ *Fairman v. Ford*, 70 Vt. 111; 39 Atl. 748.

¹⁶ *Omaha, etc., Co. v. Burns*, 49 Neb. 229; 68 N. W. 492.

quantity the owner takes the risk of such water's not being suitable for his needs.¹⁷ But if the purpose for which the well was to be sunk was known to both parties and it was a term of such contract by implication that a supply of water suitable for such purpose was to be obtained, failure to obtain a supply sufficient for such purpose is a breach.¹⁸ So one who agrees to furnish a certain kind of chattel, such as machinery to be built according to specifications furnished by the vendee,¹⁹ furnaces,²⁰ elevators in which a larger motor²¹ or deeper cushions²² than those provided for in the contract should have been specified, a refrigerating machine though defective because the owner did not furnish a cinder foundation as he had agreed to do,²³ or because the specific refrigerating machine contracted for had not sufficient capacity,²⁴ or boilers, though not capable of the pressure desired,²⁵ nor having the heating surface contracted for, if made in exact accordance with specifications;²⁶ or such as marble for slabs,²⁷ and who furnishes exactly what he agreed to furnish may recover although the chattel proves unsuitable for the use intended for it by vendee.

§1385. Substantial performance sufficient.

The original Common-Law rule required a strict and literal performance as a condition precedent to recovery. The modern rule permits recovery without a strict and literal performance if there has been a substantial performance and the contractor

¹⁷ Electric Lighting Co. v. Elder, 115 Ala. 138; 21 So. 983.

¹⁸ Sigworth v. Holcomb (Ia.), 79 N. W. 364.

¹⁹ Curwen v. Quill, 165 Mass. 373; 43 N. E. 203; Thompson Mfg. Co. v. Gunderson, 106 Wis. 449; 49 L. R. A. 859; 82 N. W. 299.

²⁰ Perkins v. Roberge, 69 N. H. 171; 39 Atl. 583; Gantt v. Cox & Sons Co., 199 Pa. St. 208; 48 Atl. 992.

²¹ Morse v. Puffer, 182 Mass. 423; 65 N. E. 804.

²² Muckle v. Payne, 198 Pa. St. 444; 48 Atl. 413.

²³ Dodsworth v. Iron Works, 66 Fed. 483; 13 C. C. A. 552.

²⁴ Gubbins v. Lautenschlager, 74 Fed. 160.

²⁵ Haskin Wood-Vulcanizing Co. v. Shipbuilding Co., 94 Va. 439; 26 S. E. 878.

²⁶ City, etc., Ry. v. Basshar, 82 Md. 397; 33 Atl. 635.

²⁷ Evans v. Mfg. Co., 118 Mo. 548; 24 S. W. 175.

has attempted in good faith to perform the contract.¹ If a contract has been performed substantially and deviations from the contract have been made, but not wilfully or in bad faith, the party so performing can recover the contract price, less the amount of damages caused by such deviation.² The amount of such damages is usually the expense of completion according to the contract.³

§1386. Substantial performance if breach immaterial.

A technical breach which does not result in damage is, of course, consistent with substantial performance.¹ Thus a contract by which A agrees to construct a level to drain B's mine in consideration of one-eighth of the ore mined therefrom may be enforced by A though the level is permitted to get out of repair, if the level is sufficient for practical purposes and B is in no way prejudiced thereby.² So a contract for constructing a public improvement is not discharged by the invalidity of a particular assessment which did not enter into the bid or contract.³ So if a surrender of an insurance policy is required as a condition of obtaining a paid-up policy, the fact

¹ *Elizabeth (City of) v. Fitzgerald*, 114 Fed. 547; 52 C. C. A. 321; *Kauffman v. Raeder*, 108 Fed. 171; 54 L. R. A. 247; 47 C. C. A. 278; *Fitzgerald v. La Porte*, 64 Ark. 34; 40 S. W. 261; *Hill v. McKay*, 94 Cal. 5; 29 Pac. 406; *Griffith v. Happersberger*, 86 Cal. 605, 614; 25 Pac. 137, 487; *Etna, etc., Works v. Kossuth County*, 79 Ia. 40; 44 N. W. 215; *Hattin v. Chase*, 88 Me. 237; 33 Atl. 989; *Phelps v. Beebe*, 71 Mich. 554; 39 N. W. 761; *Leeds v. Little*, 42 Minn. 414; 44 N. W. 309; *Crouch v. Gutmann*, 134 N. Y. 45; 30 Am. St. Rep. 608; 31 N. E. 271; *Flaherty v. Miner*, 123 N. Y. 382; 25 N. E. 418; *Kane v. Stone Co.*, 39 O. S. 1; *Moore v. Carter*, 146 Pa. 492; 23 Atl. 243; *Gallagher v. Sharpless*, 134 Pa. 134; 19 Atl. 491; *Linch v.*

Lumber Co., 80 Tex. 23; 15 S. W. 208; *Meincke v. Falk*, 61 Wis. 623; 50 Am. Rep. 157; 21 N. W. 785.

² *Kauffman v. Raeder*, 108 Fed. 171; 54 L. R. A. 247; 47 C. C. A. 278; *Hattin v. Chase*, 88 Me. 237; 33 Atl. 989; *Smith v. Packard*, 94 Va. 730; 27 S. E. 586.

³ *Phelps v. Beebe*, 71 Mich. 554; 39 N. W. 761; *Flaherty v. Miner*, 123 N. Y. 382; 25 N. E. 418.

¹ *Singer Mfg. Co. v. McLean*, 105 Ala. 316; 16 So. 912; *Morgan Park v. Gahan*, 136 Ill. 515; 26 N. E. 1085; *Crawford v. Witherbee*, 77 Wis. 419; 9 L. R. A. 561; 46 N. W. 545.

² *Crawford v. Weatherbee*, 77 Wis. 419; 9 L. R. A. 561; 46 N. W. 545.

³ *Morgan Park v. Gahan*, 136 Ill. 515; 26 N. E. 1085.

that the original policy has been stolen from the insured does not defeat his right, on complying with all the other requisites, to obtain a paid-up policy.⁴ So the right of the insured to change the beneficiary is not defeated because the former beneficiary refuses to deliver up the original certificate, and he is therefore unable to comply with a provision requiring its surrender as a pre-requisite to changing the beneficiary.⁵

§1387. Substantial performance of building contracts.

If one who has agreed to construct a building performs the contract substantially and makes a *bona fide* effort to comply with its terms, slight defects in his work and slight deviations from the contract will not prevent him from recovering the contract price, less the amount that will be necessary to make the building conform to the terms of the contract.¹ On the one hand the owner cannot terminate the contract for slight departures from its terms,² and on the other hand the contractor cannot recover the entire contract price without any abatement for the expense of making the work conform to the contract.³ Thus a slight deviation from the plans caused by a mistake in measurement, not discovered by either party or the architect until the contract is completed, and not affecting the external appearance of the house or its usefulness, does not

⁴ Wilcox v. Assurance Society, 173 N. Y. 50; 93 Am. St. Rep. 579; 65 N. E. 857.

⁵ Lahey v. Lahey, 174 N. Y. 146; 95 Am. St. Rep. 554; 61 L. R. A. 791; 66 N. E. 929. (An action between the former beneficiary and the new beneficiary.)

¹ Harlan v. Stufflebeem, 87 Cal. 508; 25 Pac. 686; Healy v. Fallon, 69 Conn. 228; 37 Atl. 495; Palmer v. Britannia Co., 188 Ill. 508; 59 N. E. 247; Keeler v. Herr, 157 Ill. 57; 41 N. E. 750; Cook v. Luxfer Prism Co., 93 Ill. App. 299; Wagner v. Allen, 174 Mass. 563; 55 N. E. 320; Scheible v. Klein, 89 Mich. 376; 50 N. W. 857; Feeney v.

Bardsley, 66 N. J. L. 239; 49 Atl. 443; Oberlies v. Bullinger, 132 N. Y. 598; 30 N. E. 999; Nolan v. Whitney, 88 N. Y. 648; Woodward v. Fuller, 80 N. Y. 312; Phillip v. Gallant, 62 N. Y. 256; Ashley v. Henahan, 56 O. S. 559; 47 N. E. 573; Kane v. Stone Co., 39 O. S. 1; Goldsmith v. Hand, 26 O. S. 101; Aldrich v. Wilmarth, 3 S. D. 523; 54 N. W. 811; Anderson v. Harper, 30 Wash. 378; 70 Pac. 965; Laycock v. Parker, 103 Wis. 161; 79 N. W. 327.

² West v. Suda, 69 Conn. 60; 36 Atl. 1015.

³ Keeler v. Herr, 157 Ill. 57; 41 N. E. 750.

prevent the performance from being substantial.⁴ So a contract to furnish glass for a house is performed substantially where, of over a hundred panes, all but two are perfect, and those two are defective in a way not uncommon in glass of that kind.⁵ So a contract to decorate the walls of a room, do the wood-work and provide furniture for five thousand two hundred dollars is performed substantially where everything is done according to the terms of the contract except the wood-work; and the defects in that can be remedied for five hundred dollars.⁶ So a contract for plumbing is substantially performed where the only defects are in certain connections which can be completed for a small part of the contract price, even though the system is useless as he left it.⁷

§1388. Substantial performance of other contracts.

The doctrine of substantial performance is by no means limited to building contracts. If any contract is performed substantially, recovery can be had thereon subject to recoupment of damages, if any.¹ Recovery can be had in case of substantial performance of a contract to construct a heating apparatus.² A contract for the sale of realty free from encumbrances is substantially performed, though encumbrances exist, if they are less than the amount of the purchase money,³ especially if a release of them is obtained and tendered.⁴ A contract to consolidate two corporations and to assign all the stock of one of them is substantially performed by trans-

⁴ *Oberlies v. Bullinger*, 132 N. Y. 598; 30 N. E. 999.

⁵ *Robert Mitchell Furniture Co. v. Monarch* (Ky.), 39 S. W. 823.

⁶ *Piteairn v. Philip Hiss Co.*, 113 Fed. 492; 51 C. C. A. 323; reversing 107 Fed. 425. (The question was for the jury. The court could not say as a matter of law that such facts did not make substantial performance.)

⁷ *Jones & Hotchkiss Co. v. Davenport*, 74 Conn. 418; 50 Atl. 1028.

¹ *Gottschalk Co. v. Cattle Feeding Co.*, 62 Fed. 901; *Hill v. McKay*, 94 Cal. 5; 29 Pac. 406; *Ayer v. Bangor*, 35 Me. 511; 27 Atl. 523; *Hayes v. Stortz*, 131 Mich. 63; 90 N. W. 678.

² *Shepard v. Mills*, 173 Ill. 223; 50 N. E. 709; affirming 70 Ill. App. 72.

³ *Guild v. R. R.*, 57 Kan. 70; 33 L. R. A. 77; 45 Pac. 82.

⁴ *McCourt v. Johns*, 33 Or. 561; 53 Pac. 601.

ferring the assets, good will and three-fourths of the stock of such corporation, and suppressing its competition.⁵ So a contract giving A a prior right, over any other person, to buy B's stock in a corporation is substantially performed by giving A an opportunity to buy such stock at the price for which it is finally sold.⁶ A contract by A to effect a sale of B's land during the existence of an option thereon is substantially performed if A effects a valid contract for such sale, though the deeds are not executed until the option has expired.⁷ A contract to pay a certain sum for land down and the balance in a certain time is substantially performed by the tender of the entire amount due, such tender being kept good.⁸ So a contract to convey land to B is substantially performed where the grantor conveys to A who then conveys to B.⁹ A contract to locate a business at a certain town is substantially performed by locating such business there, in good faith, though it is subsequently removed, or its property and franchises are sold at judicial sale to one who removes the business.¹⁰ So a contract to publish a newspaper in an addition to a town for a given time is substantially performed where the paper is printed and distributed in such addition for such time, though the publisher writes his editorials and sets type for a small portion of the time outside of such addition, because the adversary party does not furnish him an office as he had agreed to do.¹¹ The doctrine of substantial performance applies to contracts to locate railroads.¹² Thus a contract that one road should intersect another "at" a given city is substantially performed where they intersect within a hundred yards of the city limits.¹³ So a contract by which a street railway com-

⁵ German Savings Institution v. Refrigerating Co., 70 Fed. 146; 17 C. C. A. 34.

⁶ Harris v. Scott, 67 N. H. 437; 32 Atl. 770.

⁷ Reed v. Crane, 89 Mo. App. 670.

⁸ Black v. Maddox, 104 Ga. 157; 30 S. E. 723.

⁹ Bengé v. Potter (Ky.), 55 S. W. 431.

¹⁰ Elizabethtown v. Ry., 94 Ky. 377; 22 S. W. 609.

¹¹ Sanborn v. Murphy, 86 Tex. 437; 25 S. W. 610.

¹² Judson v. Gage, 91 Cal. 304; 27 Pac. 676.

¹³ Ft. Worth, etc., Ry. v. Williams (Tex.), 18 S. W. 206. (The word "at" as applied to the intersection was contrasted by the court

pany agrees to "build its road" to a given place, is substantially performed, though for part of the distance such railway exercises its statutory right to make use of the track of another railway company.¹⁴ However, a contract to extend a railroad to a certain section of land is not performed by extending beyond such section, but not nearer to it than five hundred feet.¹⁵ Building a different railroad from that agreed upon is not substantial performance of such contract.¹⁶ A contract to haul all the wood cut upon a certain tract, amounting to about eight thousand cords, is substantially performed by hauling all but a few scattered blocks which amounted to about one-tenth of one per cent of the entire amount of wood.¹⁷ The contractor's act in voluntarily collecting the scattered blocks at considerable expense after suit is brought, is not an admission that he had not performed the contract before bringing suit, but is to be referred to an excess of caution. A contract to render ordinary services not involving personal skill, is substantially performed if the contractor employs others to assist him in doing the work.¹⁸ A contract to share fees with one who collects certain claims, by obtaining the passage of an Act of Congress for the purpose of such settlement, is substantially performed where a bill is passed at a later season, substantially like the former bill, except that it provides for the payment to claimant in person.¹⁹ A contract to devote all one's time to a certain business, is substantially performed though the contractor is absent for short periods of time when his presence is not necessary to the success of the business.²⁰ A contract for constructing waterworks, or furnishing water pressure, if substantially performed, entitles the contractor to re-

with "in" as applied to the location of the depot.)

¹⁴ *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654; 67 Pac. 1086.

¹⁵ *Stevens v. Ambler*, 39 Fla. 575; 23 So. 10.

¹⁶ *Northup v. Standifer* (Ky.), 23 S. W. 348; *Northup v. Ward* (Ky.), 15 S. W. 247.

¹⁷ *Drew v. Goodhue*, 74 Vt. 436; 52 Atl. 971.

¹⁸ *Horne v. McRae*, 53 S. C. 51; 30 S. E. 701.

¹⁹ *Spalding v. Mason*, 161 U. S. 375.

²⁰ *Singer Mfg. Co. v. McLean*, 105 Ala. 316; 16 So. 912; *Shoemaker v. Acker*, 116 Cal. 239; 48 Pac. 62.

covery, subject to recoupment for damages caused by failure to perform literally.²¹ Hence the contractor is not liable for damages resulting from defects after the owner has had a reasonable opportunity to remedy them.²² So a contract to sink a well is substantially performed in case of an oil well by drilling until oil is struck, even though the contractor loses his tools in the well, which is, on that account, somewhat less valuable.²³ So, in case of a well for water, drilling till water is found, is a substantial performance although the contractor does not put a screen at the bottom of the well, because the other party orders him to stop work.²⁴ So one who contracts to drill a well and commences work, may abandon that well and drill another one if completion of the first becomes impracticable by reason of the breaking of the drill.²⁵ A contract to manufacture chattels, to conform to a given pattern or style, is enforceable if substantially performed.²⁶ The proof of a shield design for an advertising sign, was approved by the party for whom it was made, with the statement that he wanted "something of that style." Slight changes made afterwards in placing the words upon the sign, were held not to prevent substantial performance.²⁷ A contract for sending goods for sale on commission, goods not returned in thirty days with express charges prepaid to be treated as sold, is substantially performed by returning the goods within thirty days and remitting the amount of the express charges within a reasonable period after the expiration of thirty days.²⁸ A caterer who does not furnish as good an entertainment as he agreed, but acts in good faith, performs substantially so that he may recover the contract price subject to recoupment for damages.²⁹

²¹ Wiley v. Athol, 150 Mass. 426;
6 L. R. A. 342; 23 N. E. 311.

²² Hansen v. Beebe, 111 Ia. 534;
82 N. W. 942.

²³ Holmes v. Oil Co., 138 Pa. St.
546; 21 Am. St. Rep. 919; 2 Atl.
231.

²⁴ Madden v. Oestrich, 46 Minn.
538; 49 N. W. 301.

²⁵ Thompson v. Brown, 106 Ia.
367; 76 N. W. 819.

²⁶ Bailey v. Wayman, 201 Pa. St.
249; 50 Atl. 767; Meincke v. Falk,
61 Wis. 623; 50 Am. Rep. 157; 21
N. W. 785.

²⁷ Thoubboron v. Lewis, 43 Mich.
635; 38 Am. Rep. 218; 5 N. W.
1082.

²⁸ Main v. Oien, 47 Minn. 89; 49
N. W. 523.

²⁹ Ponce v. Smith, 84 Me. 266; 24
Atl. 854.

A contract that manufacturing agents shall keep a patented fence in stock to fill orders taken by their selling agent, is substantially performed by their having materials and machinery for making such fence and being prepared to furnish it upon demand.³⁰ A provision that the vendee of a grain separator is to give the vendor notice when he intends to open the threshing season, so that the vendor may send down an expert to remedy defects, is substantially performed if the vendor in fact sends an expert at the time of the opening.³¹ A contract to advance thirty-three thousand dollars for bonds of a corporation is satisfied by paying eighteen thousand dollars and retiring fifteen thousand dollars par value of old bonds of the corporation, even though only fourteen thousand dollars was paid to procure such bonds.³² A contract to maintain an omnibus line from a given hotel to the depot, is substantially performed although at times the same omnibus was used to take passengers to several different hotels, and a separate omnibus line was contemplated by the contract.³³ A contract to place and keep up fourteen hundred signs on an elevated railway, is substantially performed where all were kept up except twenty, and these were placed in galleries leading to a bridge, but were removed and placed in temporary galleries while the other galleries were being reconstructed.³⁴ A contract by which owners of adjoining sections of low land agree to fill in the land owned by them as fast as adjoining land is filled in, so that it is unnecessary to have a barrier on the division line to retain the earth thus filled, and provide that if such filling is not made the adjoining owner may build the barrier at the expense of the former, is substantially performed where the former builds such barrier at his own expense.³⁵ A contract, whereby A agrees to assign certain patents to B, is substan-

³⁰ Carrington v. Waff, 112 N. C. 115; 16 S. E. 1008.

³¹ Hansen v. Gaar, 68 Minn. 68; 70 N. W. 853.

³² Franklin Trust Co. v. Electric Co., 57 N. J. Eq. 42; 41 Atl. 488.

³³ Hathaway v. Lynn, 75 Wis.

186; 6 L. R. A. 551; 43 N. W. 956.

³⁴ Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486; 56 N. E. 995.

³⁵ Commonwealth v. Wharf Co., 166 Mass. 395; 44 N. E. 350.

tially performed where at B's request A assigns such patents to X for B's use.³⁶ A contract by which a hospital agrees to support three beds for use of soldiers, to be used by others when there are no soldier applicants, is substantially performed where the hospital accepts all applications for admission made by soldiers.³⁷ A contract to keep buildings and machinery insured for not less than six thousand two hundred dollars, payable to the lessors as their interests may appear, is substantially performed if the lessee obtains insurance upon the buildings amounting to more than three thousand dollars, and upon the machinery amounting to more than four thousand dollars, payable to the lessors as their interests should appear.³⁸ In this case the machinery belonged to the lessees, but a provision of the lease gave the lessors a lien thereon for all unpaid rent. A contract by a bridge company with the city to sell a hundred tickets crossing the bridge for one dollar, is substantially performed if the bridge company sells five tickets for one dollar, each ticket good for twenty crossings.³⁹ Substantial performance of a contract to exterminate all the prairie dogs on a certain tract of land, will entitle the contractor to recovery.⁴⁰

§1389. Examples of attempted performance not substantial performance.

If performance of the contract has not been waived by the adversary party no recovery upon the contract can be had when the contract has not been at least substantially performed.¹ The question as to liability for benefits received where the work is accepted with knowledge of defects is discussed else-

³⁶ Dalzell v. Watch Case Co., 138 N. Y. 285; 33 N. E. 1071.

³⁷ Cottage Hospital v. Merrill, 92 Ia. 649; 61 N. W. 490.

³⁸ Guetzkow Bros. Co. v. Breese, 96 Wis. 591; 65 Am. St. Rep. 83; 72 N. W. 45.

³⁹ Newport v. Bridge Co., 90 Ky. 193; 8 L. R. A. 484; 13 S. W. 720.

⁴⁰ Craig v. Weitner, 33 Neb. 484; 50 N. W. 442.

¹ Greene v. Linton, 7 Port. (Ala.) 133; 31 Am. Dec. 707; Bull v. St. Johns, 39 Ga. 78; Swanzey v. Moore, 22 Ill. 63; 74 Am. Dec. 134; Angle v. Hanna, 22 Ill. 429; 74 Am. Dec. 161; Barr v. Henderson, 105 La. 691; 30 So. 158; Gill v. Vogler, 52 Md. 663; Olmstead v. Beale, 19 Pick. (Mass.) 528; Taylor v. Marcum, 60 Minn. 292; 62 N. W. 330; Nelichka v. Esterly, 29

where.² If the building is materially different from that contracted for, no substantial performance can be said to exist.² In building contracts a deviation from the terms of the contract which cannot be corrected without a partial⁴ or total⁵ reconstruction of the building, cannot be corrected by a mere recoupment of damages⁶ and is not substantial performance.⁷ Thus a contract to build a building fifty feet by one hundred fifty feet in size is not substantially performed by building one seventy-eight feet by one hundred feet, even if more valuable than the building contracted for, and even if the contract was merely for mortgage security.⁸ Where the girders are not of the length contracted for and a wooden partition is omitted there is no substantial performance;⁹ so if the roof is less than the required pitch, and the shingles are in part of inferior quality and poorly laid, leaving many holes in the roof, and the siding is unsound and split, leaving holes in the side of the building.¹⁰ So a contract to build a monument is not substantially performed if of different dimensions from those specified in the contract.¹¹ A contract for constructing a burial vault, the ends of which are to be of solid pieces of stone is

Minn. 146; 12 N. W. 457; Butt v. Williams (Miss.), 15 So. 130; Earp v. Tyler, 73 Mo. 617; Miller v. Goddard, 34 Mo. 102; 56 Am. Dec. 638; Henson v. Hampton, 32 Mo. 408; Omaha Consolidated Vinegar Co. v. Burns, 44 Neb. 21; 62 S. W. 301; Jennings v. Camp, 13 Johns. 94; 7 Am. Dec. 367; Mehurin v. Stone, 37 O. S. 49; Martin v. Schoenberg, 8 Watts & S. (Pa.) 367; Kelley v. Bradford, 33 Vt. 35.

² See §§ 1603, 1604.

³ Braseth v. Bank, — N. D. —; 98 N. W. 79.

⁴ Sarrazin v. Adams, 111 La. 124; 34 So. 301; Spence v. Ham, 163 N. Y. 220; 51 L. R. A. 238; 57 N. E. 412.

⁵ Swain v. Seamens, 9 Wall. (U. S.) 254.

⁶ Elliott v. Caldwell, 43 Minn.

357; 9 L. R. A. 52; 45 N. W. 845.

⁷ Perry v. Quackenbush, 105 Cal. 299; 38 Pac. 740; Eaton v. Gladwell, 121 Mich. 444; 80 N. W. 292; Anderson v. Pringle, 79 Minn. 433; 82 N. W. 682; Spence v. Ham, 163 N. Y. 220; 51 L. R. A. 238; 57 N. E. 412.

⁸ Swain v. Seamens, 9 Wall. (U. S.) 254.

⁹ Spence v. Ham, 163 N. Y. 220; 51 L. R. A. 238; 57 N. E. 412.

¹⁰ Cornish, etc., Co. v. Dairy Association, 82 Minn. 215; 84 N. W. 724. The contract is not performed even if it was for the erection of a creamery, and the building could be rebuilt for one-fifth of the entire cost of the creamery.

¹¹ Cutler v. Dix, 67 Vt. 347; 31 Atl. 780.

not performed substantially by constructing a vault the ends of which are not solid blocks of stone, but are pieced together out of a number of small blocks.¹² So a contract for building a retaining wall is not substantially performed where it bulges nine inches.¹³ Thus a contract to put in a steam plant is not substantially performed where an engine of specified horse-power, required by the contract, has not been set up.¹⁴ If the contract calls for a boiler of one hundred fifty per cent of the capacity of the boiler already in use; and the boiler actually furnished has only eighty-two per cent of such capacity, there is no substantial performance.¹⁵ So a contract to put in an elevator to have a certain capacity to lift a certain number of feet and to be "suitable for passenger and freight service" is not substantially performed where it has considerably smaller capacity and will not come down to the first floor or go up to the top by four inches.¹⁶ A contract to provide boilers for heating, to have a capacity of one hundred forty nominal horse-power and to meet two other requirements, is not substantially performed by furnishing boilers of a capacity of one hundred thirty nominal horse-power, though the other requirements are complied with.¹⁷ A contract to furnish a steam heating apparatus of a capacity to warm each room of a greenhouse to seventy degrees in the coldest weather, with a boiler of capacity for a continuous run for ten hours, is not substantially performed by raising the temperature to seventy degrees for a short time during very cold weather.¹⁸ A contract to construct a furnace to heat a dwelling to a given temperature by means of hot air is not substantially performed if in fulfilling the requirement as to temperature the furnace generates coal gas and fills the house with it so as to render the rooms unsuit-

¹² *Mehurin v. Stone*, 37 O. S. 49.

¹³ *Lynes v. Hall*, 60 Minn. 532; 63 N. W. 108. The wall was thirty feet long. No adequate reason to rebut the inference of poor workmanship was shown for the bulging of the wall.

¹⁴ *North v. Mallory*, 94 Md. 305; 51 Atl. 89.

¹⁵ *Manitowoc, etc., Co. v. Glue Co.*, — Wis. —; 97 N. W. 515.

¹⁶ *Clarke v. Machine Co. (Ky.)*, 42 S. W. 844.

¹⁷ *Heine Safety Boiler Co. v. Francis*, 117 Fed. 235; 54 C. C. A. 267.

¹⁸ *Kramer v. Messner*, 101 Ia. 88; 69 N. W. 1142.

able for use.¹⁹ An architect who is to furnish plans and specifications for a building and an estimate of its probable cost, cannot recover if the actual cost of the building greatly exceeds his estimate.²⁰ So if he is employed to draw plans for a building at a cost not to exceed four thousand five hundred dollars, he cannot recover if he draws plans for a building estimated to cost more than eight thousand dollars.²¹ A contract to convey realty subject to certain encumbrances is not performed substantially by offering to convey with greater encumbrances, but with a covenant in the deed to reduce them to the amount contracted for.²² A contract to locate a business,²³ is not substantially performed by merely constructing the buildings in which it is expected that such business will thereafter operate; nor is a contract to locate the business of a specified corporation in a certain city substantially performed by transferring the business and good will of the corporation to a partnership formed of men who were interested in such corporation and who transfer such business to such city.²⁴ A contract to obtain an assignment of a note on deposit as collateral security for one debt, as further security for another, is not performed substantially where an assignment is made, valid as between parties but invalid as to attaching creditors.²⁵ A contract to bring suit to contest the legality of certain charges is not substantially performed where such suit is brought, but is dismissed before final judgment without the consent of the promisee.²⁶ A contract requiring a shipment of goods between specified dates by "sailer or sailers," is not performed substantially by shipping such articles by steamer not within such dates.²⁷ A contract to sink a well to such a depth that water would be reached, is not

¹⁹ Fuller-Warren Co. v. Shurts, 95 Wis. 606; 70 N. W. 683.

²⁰ Feltham v. Sharp, 99 Ga. 260; 25 S. E. 619.

²¹ Emerson v. Kneezell (Tex. Civ. App.), 62 S. W. 551.

²² Connor v. Buhl, 115 Mich. 531; 73 N. W. 821.

²³ Ft Wayne Electric Light Co. v.

Miller, 131 Ind. 499; 14 L. R. A. 804; 30 N. E. 23.

²⁴ Keys v. Weaver, 95 Ia. 13; 63 N. W. 357.

²⁵ First National Bank v. Park, 117 Ia. 552; 91 N. W. 826.

²⁶ P. Dougherty Co. v. Gring, 89 Md. 535; 43 Atl. 912.

²⁷ Ashmore v. Cox (1899), 1 Q. B. 436.

performed substantially by sinking a shaft which is abandoned before water is reached.²⁸ A contract by a warehouse company, to keep cotton of a bailee insured in his name, is not substantially performed by keeping all the cotton in the warehouse, including that of the bailee, insured by a policy taken out in the name of the warehouseman.²⁹ A contract of employment is not performed substantially where the employe, during each month of his employment, embezzles money belonging to his employer.³⁰ Hence, under a contract of hire from month to month, the employe can recover nothing. A contract to lay water pipes through the land of a person, and to close the trenches up well and sufficiently, and make good the land and premises, is not performed substantially where the trenches are so filled up that the ground there is in places two feet above the original level.³¹ A contract to run a boundary line between two adjoining lots, and then to re-trace it, is not substantially performed where it is run and the person running the line then sights back along the stakes and decides that the line is straight.³² A deliberate and material departure from the terms of the contract, prevents substantial performance, even though the work done may be as good or as valuable to the promisee as the work agreed to be done.³³ A contract to construct sewers, using certain material, is not performed substantially where material different from that specified, although as good for practical use, is employed.³⁴ If the joists are farther apart than the contract requires no recovery can be had on the contract though the house is strong enough.³⁵ A contract to form a partnership is not substantially performed by forming a corporation.³⁶ A contract to construct a system of waterworks,

²⁸ *Bates v. Harte*, 124 Ala. 427; 32 Am. St. Rep. 186; 26 So. 898.

²⁹ *Henderson Warehouse Co. v. Brand*, 105 Ga. 217; 31 S. E. 551.

³⁰ *Peterson v. Mayer*, 46 Minn. 468; 13 L. R. A. 72; 49 N. W. 245.

³¹ *Chisholm v. Halifax*, 29 N. S. 402.

³² *Wheeler v. State*, 109 Ala. 56; 19 So. 993.

³³ *Schmidt v. North Yakima*, 12 Wash. 121; 40 Pac. 790.

³⁴ *Schmidt v. North Yakima*, 12 Wash. 121; 40 Pac. 790.

³⁵ *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442.

³⁶ *Knottsville Roller Mill Co. v. Mattingly (Ky.)*, 35 S. W. 1114.

to furnish two hundred and fifty thousand gallons a day, is not substantially performed by constructing a system which furnishes only fifty thousand gallons a day.³⁷ Literal performance may exist though substantial performance is lacking. The law does not regard this as performance.³⁸ A contract for an electric light plant, to be paid for when "found to be in good working order" is not performed by so constructing the plant that it works properly at the very moment of completion, but soon proves deficient.³⁹

§1390. Contract to be performed to satisfaction of adversary party.

A contract in which one party agrees to perform his part to the "satisfaction" of the adversary party presents important questions as to what constitutes satisfaction. Such contracts are enforceable according to the intent of the parties,¹ though from their nature some doubt has been expressed whether they could properly be called contracts.² The difficulty lies in determining what is the real intention of the parties to such a contract. The authorities are unanimous that to prevent liabil-

³⁷ *Sherman v. Conner*, 88 Tex. 35; 29 S. W. 1053.

³⁸ *Edison, etc., Electric Co. v. Navigation Co.*, 8 Wash. 370; 40 Am. St. Rep. 910; 24 L. R. A. 315; 36 Pac. 260.

³⁹ *Edison, etc., Electric Co. v. Navigation Co.*, 8 Wash. 370; 40 Am. St. Rep. 910; 24 L. R. A. 315; 36 Pac. 260.

¹ *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414; 1 L. R. A. 645; *Williams Mfg. Co. v. Brass Co.*, 173 Mass. 356; 53 N. E. 862; *Sullivan v. Ross*, 124 Mich. 287; 82 N. W. 1071; *Pennington v. Howland*, 21 R. I. 65; 79 Am. St. Rep. 774; 41 Atl. 891; *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 859; 18 S. E. 591. "It may be that the plaintiff was injudicious or indis-

creet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent on a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief. Having voluntarily assumed the obligations and risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions." *McCarren v. McNulty*, 7 Gray (Mass.) 139, 141; quoted in *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414, 415; 1 L. R. A. 645.

² *Gibson v. Carnegie*, 39 Mich. 49; 33 Am. Rep. 351.

ity after reasonably substantial performance, the dissatisfaction of the party for whom the work is done must be genuine and *bona fide*.³ If the dissatisfaction is genuine, the question is presented whether this alone will prevent liability from existing, or whether the dissatisfaction must not only be genuine, but must also be caused by such omissions or defects as would cause a reasonable man to be dissatisfied. This depends in part upon the nature of the contract. If the subject-matter of the contract involves personal taste or feeling, dissatisfaction, if genuine, prevents liability from existing, even if a reasonable man under similar circumstances would have been satisfied.⁴ Thus an artist who agreed to paint for A a portrait of A and his wife, which he agreed should be "satisfactory" to A cannot recover if A is not satisfied, no matter how good the picture is.⁵ The same result has been reached under a contract to make a portrait of a deceased child from a photograph, to the satisfaction of the father,⁶ or to make a plaster bust of a deceased husband to the satisfaction of the widow.⁷ Thus a contract for furnishing roofing tile of a rare and peculiar color,⁸ or for making a suit of clothes⁹ to the satisfaction of the adversary party is not performed unless he is satisfied. So a contract for

³ *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414; 1 L. R. A. 645; *Silby Mfg. Co. v. Chico*, 24 Fed. 893; *Worthington v. Gwin*, 119 Ala. 44; 43 L. R. A. 382; 24 So. 739; *Electric Lighting Co. v. Elder*, 115 Ala. 138; 21 So. 983; *Adams, etc., Works v. Schnader*, 155 Pa. St. 394; 35 Am. St. Rep. 893; 26 Atl. 745; *Singerly v. Thayer*, 108 Pa. 291; 56 Am. Rep. 207; 2 Atl. 230; *McClure v. Briggs*, 58 Vt. 82; 56 Am. Rep. 557; 2 Atl. 583; *Daggett v. Johnson*, 49 Vt. 345; *Exhaust Ventilator Co. v. Ky.*, 56 Wis. 218; 57 Am. Rep. 257; 28 N. W. 343.

⁴ *Zaleski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446; *Brown v. Foster*, 17 Mass. 136; 18 Am. Rep. 463; *Walter A. Wood, etc., Co. v. Smith*,

50 Mich. 565; 45 Am. Rep. 57; 15 N. W. 906; *Gibson v. Carnage*, 39 Mich. 49; 33 Am. Rep. 351; *Pennington v. Howland*, 21 R. I. 65; 79 Am. St. Rep. 774; 41 Atl. 891; *McClure Bros. v. Briggs*, 58 Vt. 82; 56 Am. Rep. 557; 2 Atl. 583; *Daggett v. Johnson*, 49 Vt. 345; *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528.

⁵ *Pennington v. Howland*, 21 R. I. 65; 79 Am. St. Rep. 774; 41 Atl. 891.

⁶ *Gibson v. Carnage*, 39 Mich. 49; 33 Am. Rep. 351.

⁷ *Zaleski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446.

⁸ *McNeil v. Armstrong*, 81 Fed. 943.

⁹ *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463.

personal services as long as they are "satisfactory" to the employer may be terminated by him at any time when he is dissatisfied in good faith, and the justice of such dissatisfaction cannot be inquired into.¹⁰ Thus in case of actual dissatisfaction, whether justified or not, an employer may terminate a contract of employment as chef,¹¹ furrier,¹² or manager of a business.¹³ Thus a county may discharge a superintendent of bridge work who is employed as long as his work is satisfactory to the county commissioners, where they are dissatisfied with him for advising them to accept exorbitant bids for bridge material in which he was interested, even if such advice was not within the terms of his employment, where the superintendent and the board both treated it as part of his work.¹⁴ Even under such a contract a discharge of the employee for any reason other than genuine dissatisfaction is a breach of the contract. Thus one who is employed as brakeman permanently as long as his services are satisfactory in consideration of his release of damages for personal injury, can recover where he is discharged because brakemen were no longer to be employed where he was working.¹⁵ Dissatisfaction such as justifies termination of the contract may exist before performance has begun,¹⁶ as it may be caused by the delay of the adversary party in commencing performance.¹⁷ An analogous line of cases is found in contracts of employment in which the amount of wages is left to the decision of the employer. In such cases the employer, if acting in good faith, is the sole judge,¹⁸ and his decision is conclusive if he fixes the compensation below what the

¹⁰ *Daniels v. Decatur County*, 99 Ia. 440; 68 N. W. 718; *Sax v. R. R.*, 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314; *Koehler v. Buhl*, 94 Mich. 496; *Frary v. Rubber Co.*, 52 Minn. 264; 18 L. R. A. 644; 53 N. W. 1156; *Rossiter v. Cooper*, 23 Vt. 522; *Evans v. Bennett*, 7 Wis. 404.

¹¹ *Bush v. Koll*, 2 Colo. App. 48.

¹² *Koehler v. Buhl*, 94 Mich. 496; 54 N. W. 157.

¹³ *Frary v. Rubber Co.*, 52 Minn.

264; 18 L. R. A. 644; 53 N. W. 1156.

¹⁴ *Daniels v. Decatur County*, 99 Ia. 440; 68 N. W. 718.

¹⁵ *Sax v. R. R.*, 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314.

¹⁶ *Magee v. Lumber Co.*, 78 Minn. 11; 80 N. W. 781.

¹⁷ *Magee v. Lumber Co.*, 78 Minn. 11; 80 N. W. 781.

¹⁸ *Taylor v. Brewer*, 1 Maule & S. 290.

court would hold to be a reasonable amount.¹⁹ Thus under a contract to render services as attorney for such a fee as the client "is able to pay and thinks reasonable," the client's decision is conclusive.²⁰ A contract to increase the salary of an employe if at any time the amount of increased business or the character of the employe's work fairly justifies a change of mind on the part of the employer as to the amount to be paid, makes the employer the sole judge as to such facts.²¹ If the subject-matter of the contract does not involve personal taste and feeling, there is a conflict of authority on the question of whether a genuine but unreasonable dissatisfaction will prevent liability from existing under the contract. Some authorities hold that even in cases of this class a genuine dissatisfaction will prevent the party dissatisfied from being liable upon the contract, even if a reasonable man would have been satisfied.²² Examples of contracts in which this principle has been applied are, a contract to make brick "to the satisfaction" of the vendee's superintendent,²³ a contract to tow lumber,²⁴ to sew cotton bales;²⁵ and a contract to put in a heating apparatus to the vendee's satisfaction, the contract providing that it should give entire satisfaction, and that if it proved "unsatisfactory after a thorough and reasonable trial, we will remove it at our own expense."²⁶ Similar results have been reached under a contract to furnish a printing press,²⁷ a patent elevator,²⁸ a harvest-

¹⁹ *Butler v. Mill Co.*, 28 Minn. 205; 41 Am. Rep. 277; 9 N. W. 697.

²⁰ *Howe v. Kenyon*, 4 Wash. 677; 30 Pac. 1058.

²¹ *Blaine v. Knapp*, 140 Mo. 241; 41 S. W. 787.

²² *Adams, etc., Works v. Schnader*, 155 Pa. St. 394; 35 Am. St. Rep. 893; 26 Atl. 745; *Barrett v. Coke Co.*, 51 W. Va. 416; 90 Am. St. Rep. 802; 41 S. E. 220; *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 859; 18 S. E. 591.

²³ *Barrett v. Coke Co.*, 51 W. Va. 416; 90 Am. St. Rep. 802; 41 S. E. 220.

²⁴ *Magee v. Lumber Co.*, 78 Minn. 11; 80 N. W. 781.

²⁵ *Allen v. Compress Co.*, 101 Ala. 574; 14 So. 362.

²⁶ *Adams, etc., Works v. Schnader*, 155 Pa. St. 394; 35 Am. St. Rep. 893; 26 Atl. 745. So of a contract to put in a plumbing and heating plant. (*Fairmont*) *Plumbing Co. v. Carr*, 54 W. Va. 272; 46 S. E. 458.

²⁷ *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414; 1 L. R. A. 645.

²⁸ *Singerly v. Thayer*, 108 Pa. St. 291; 56 Am. Rep. 207.

ing machine,²⁹ a binding machine,³⁰ or an organ³¹ which is to operate to the satisfaction of the vendee. So one who is to make a book-case to the satisfaction of another cannot recover without showing that such other was in fact satisfied. It is not enough to show that he ought to have been satisfied.³² If a machine is sold to work in a "satisfactory" manner, this means that its operation must be satisfactory as the vendee operates it, even though a person of ordinary skill could operate it properly and other persons in the vendee's business would be satisfied.³³ Thus a test of a heater for a residence is sufficient if made under the supervision of ordinary servants. The fact that a skilled engineer and a plumber can make it work in a satisfactory manner does not show performance.³⁴ If the machine operates reasonably well but not to the satisfaction of the vendee, he may avoid the contract, but he cannot keep the machine and recoup damages.³⁵ So a provision for paying the physician of a railroad company, "subject to the approval" of certain officers of the railroad makes their approval a condition precedent to recovery.³⁶ Other authorities hold that a contract to do work not involving personal taste or feeling to the satisfaction of the adversary party means that the work must be so done that the adversary party, if a reasonable man, would be satisfied therewith.³⁷ Among contracts to which this principle applies are contracts to sink a well which will produce a satisfactory flow of water;³⁸ to put in a heating apparatus in "first-class working order" to be

²⁹ *Walter A. Wood, etc., Co. v. Smith*, 50 Mich. 565; 45 Am. Rep. 57; 15 N. W. 906.

³⁰ *Plano Mfg. Co. v. Ellis*, 68 Mich. 101; 35 N. W. 841; *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 859; 18 S. E. 591.

³¹ *McClure v. Briggs*, 58 Vt. 82; 56 Am. Rep. 557; 2 Atl. 583.

³² *McCarren v. McNulty*, 7 Gray (Mass.) 139.

³³ *Haney-Campbell Co. v. Creamery Association*, 119 Ia. 188; 93 N. W. 297.

³⁴ *Adams, etc., Co. v. Schnader*, 155 Pa. St. 394; 35 Am. St. Rep. 893; 26 Atl. 745.

³⁵ *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414; 1 L. R. A. 645.

³⁶ *Union Pacific Ry. v. Anderson*, 11 Colo. 293; 18 Pac. 24.

³⁷ *Keeler v. Clifford*, 165 Ill. 544; 46 N. E. 248; *Lockwood Mfg. Co. v. Regulator Co.*, 183 Mass. 25; 66 N. E. 420; *Hawkins v. Graham*, 149 Mass. 284; 14 Am. St. Rep. 422; 21 N. E. 312; *Bowery National Bank v. Mayor, etc., of New York*, 63 N. Y. 336; *Richison v. Mead*, 11 S. D. 639; 80 N. W. 131.

³⁸ *Richison v. Mead*, 11 S. D. 639; 80 N. W. 131.

paid for on "satisfactory completion" when "such acknowledgment has been made by the owner or work demonstrated;"³⁹ and to alter a boiler, payment to be made when the owner is "satisfied the boilers as changed are a success."⁴⁰ A contract to finish wood-work "in the best workmanlike manner to the entire satisfaction of the owner" is performed by doing the work in a good and workmanlike manner.⁴¹ A similar result was reached under a contract for laying tiles on a roof according to certain plans and specifications to the satisfaction of the owner.⁴² A sold pumps to B which were to work in a satisfactory manner. This was held to mean to the satisfaction of a reasonable person, and not necessarily the city engineer, though A knew that B was to deliver such pumps to the city under his contract with it, subject to the engineer's approval.⁴³ Similar results have been reached under a contract to furnish an evaporator,⁴⁴ or graduated milk-pans,⁴⁵ or a binding machine⁴⁶ to work to the satisfaction of the vendee. So a contract to furnish a good and satisfactory title to real estate⁴⁷ or to furnish a "first-class" title to be passed upon by vendee's attorney⁴⁸ are each satisfied by a good marketable title. A different view seems to be entertained in some states; and the dissatisfaction of the attorney, acting in good faith, discharges the contract.⁴⁹ Similar results have been reached under a contract to furnish a satisfactory lease.⁵⁰ A contract to do a piece of work to the

³⁹ *Hawkins v. Graham*, 149 Mass. 284; 14 Am. St. Rep. 422; 21 N. E. 312.

⁴⁰ *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387; 54 Am. Rep. 709; 4 N. E. 749.

⁴¹ *Dall v. Noble*, 116 N. Y. 230; 15 Am. St. Rep. 398; 5 L. R. A. 554; 22 N. E. 406.

⁴² *McNeil v. Armstrong*, 81 Fed. 943.

⁴³ *Lockwood Mfg. Co. v. Regulator Co.*, 183 Mass. 25; 66 N. E. 420.

⁴⁴ *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528.

⁴⁵ *Daggett v. Johnson*, 49 Vt. 445.

⁴⁶ *May v. Hoover*, 112 Ind. 455; 14 N. E. 472.

⁴⁷ *Moot v. Investment Association*, 157 N. Y. 201; 45 L. R. A. 666; 52 N. E. 1.

⁴⁸ *Vought v. Williams*, 120 N. Y. 253; 17 Am. St. Rep. 634; 8 L. R. A. 591; 24 N. E. 195.

⁴⁹ *Gilson v. Bank*, 180 Mass. 444; 62 N. E. 728. (The objections to the title appeared to be well taken though technical.)

⁵⁰ *Mullally v. Greenwood*, 127 Mo. 138; 48 Am. St. Rep. 613; 29 S. W. 1001.

"entire satisfaction" of the adversary party, has been held to be performed when done in a proper manner,⁵¹ as under a contract employing an actor.⁵² A contract to excavate for a railroad "according to stakes set by the engineer and to his satisfaction" requires excavation only to stakes then in place and does not give the engineer the right to change stakes until the cut is completed to his satisfaction.⁵³ So a contract to erect a wall, giving to the owner power to determine all questions as to performance, does not give him power to reject arbitrarily.⁵⁴ A contract for electric lighting to meet the approval of a certain electric light company and to be a first-class job, does not make such approval a condition precedent so as to oblige the contractor to obtain such inspection and approval.⁵⁵ A contract to sell hops, reserving to the vendees the right to terminate the contract if on examination they should determine that the hops to be packed would not produce the quality called for, does not give them the right to reject arbitrarily.⁵⁶ Such contract, therefore, has a consideration and is mutually binding.

§1391. Contracts for alternative performance.

Under a contract to do one or the other of two things, the right of choice as to which of such things shall be done in order to perform the contract, is with the promisor up to the time of the breach.¹ After the time for performing the contract has passed, the promisor has lost the right of election.² Thus, where a vendor agrees to deliver goods at one of three places by a certain time, he must exercise his option of delivering at the place of his choice before such time, or he loses the right of election.³

⁵¹ Sloan v. Hayden, 110 Mass. 141.

⁵² Smith v. Robson, 148 N. Y. 252; 42 N. E. 677.

⁵³ Olson v. Ry., 22 Wash. 139; 60 Pac. 156.

⁵⁴ Schliess v. Grand Rapids, 131 Mich. 52; 90 N. W. 700.

⁵⁵ Smith v. Packard, 94 Va. 730; 27 S. E. 586.

⁵⁶ Lilenthal v. Stearns, 121 Fed. 197.

61 Pac. 1064; Duke v. Griffith, 13 Utah 361; 45 Pac. 276; Patchin v. Swift, 21 Vt. 292; Dessert v. Scott, 58 Wis. 390; 17 N. W. 14.

² Mueller v. Pels, 192 Ill. 76; 61 N. E. 472; affirming 94 Ill. App. 353; Kramer v. Ewing, 10 Okla. 357; 61 Pac. 1064.

³ Mueller v. Pels, 192 Ill. 76; 61 N. E. 472; affirming 94 Ill. App. 353.

¹ Kramer v. Ewing, 10 Okla. 357;

So if A has the right to discharge his obligation to B within a certain time by conveying certain property or paying a certain sum of money and A does neither, B acquires the right of election.⁴

§1392. Contracts payable in something other than money at promisor's election.

Special questions arise under contracts to pay in goods or in labor, debts which are measured at a money value. The first question is whether, under such contracts, there is any right of election at all. If the contract is to deliver certain goods, or do certain work, for a consideration agreed upon, and no money value for such consideration is estimated, the debtor has no right of election.¹ Thus a contract to pay a certain part of the crops received from realty leased, and a certain number of bushels of corn as rent for such realty, is a contract in which there is no right of election, and in case of breach the lessor is to recover the market value of such corn.² If the consideration is estimated at a money value, a contract by which the creditor agrees to accept goods in payment of part or all of such debt, may be so worded as to give the debtor no election.³ So under a contract to excavate for a railroad for a certain sum, twenty-five per cent of which is payable in the railroad's stock at par does not create an election, and in case of breach, only seventy-five per cent of the contract price, together with the market value of so much stock as at par would equal twenty-five per cent of the contract price can be recovered.⁴ In such cases, if the debtor does not perform by delivering such goods at the time specified, the creditor can recover only the market value of the goods which should have been delivered, and cannot recover the money value at which the consideration was estimated. On the other hand the debtor cannot discharge his obligation by payment in money. Thus under a contract of

⁴ Phillips v. Cornelius (Miss.), 28 So. 871.

¹ Cummings v. Dudley, 60 Cal. 383; 44 Am. Rep. 58.

² Butler v. Baker, 5 O. S. 584.

³ Cleveland, etc., R. R. v. Kelley, 5 O. S. 180.

⁴ Cleveland, etc., R. R. v. Kelley, 5 O. S. 180.

sale, the purchase-price to be paid partly in interest-bearing notes, a tender of the face of the notes in cash is not sufficient.⁵ The weight of authority is, that a contract to pay a certain sum of money to be discharged by delivering goods at a certain valuation, is a contract which gives to the debtor the right of election up to the time of payment.⁶ Before breach the creditor cannot elect to receive payment in money.⁷ Thus, a contract to pay debts, estimated in money, by means of a certain amount of lumber to be delivered, one-half during each of two years, no place of delivery being specified, gives the debtor the election to pay in lumber, and the creditor cannot demand payment in money until he has made demand for the lumber, which has been refused.⁸ So under a contract to pay in bonds,⁹ or in lime,¹⁰ the creditor cannot enforce payment in money before breach. Before breach a contract to pay a certain debt in work, cannot give to the creditor a right of action to recover money. Thus, a contract to pay a debt by grinding corn,¹¹ or by sawing lumber,¹² cannot be collected in money where the payee refuses to furnish corn or lumber for such purpose. Before the debt is due, the debtor may elect to pay in money. Thus a contract to deliver a certain amount of

⁵ Sale of land. *Barbour v. Hickey*, 2 App. D. C. 207; 24 L. R. A. 763. Sale of cattle. *Morgan v. East*, 126 Ind. 42; 9 L. R. A. 558; 25 N. E. 867.

⁶ *Ragland v. Wood*, 71 Ala. 145; 46 Am. Rep. 305; *Sims v. Cox*, 40 Ga. 76; 2 Am. Rep. 560; *Owen v. Barnum*, 7 Ill. 461; *Leiter v. Emmons*, 20 Ind. Ap. 22; 50 N. E. 40; *Oldham v. Kerchner*, 79 N. C. 106; 28 Am. Rep. 302; *Choice v. Moseley*, 1 Bail. L. (S. C.) 136; 19 Am. Dec. 661.

⁷ *Ragland v. Wood*, 71 Ala. 145; 46 Am. Rep. 305; *Bradley v. Farrington*, 4 Ark. 532; *Widner v. Walsh*, 3 Colo. 548; *Farmers', etc., Co. v. R. R.*, 127 Ind. 250; 11 L. R. A. 740; 26 N. E. 784; *Leiter v. Emmons*, 20 Ind. App. 22; 50 N. E.

40; *American, etc., Co. v. Wood*, 90 Me. 516; 43 L. R. A. 449; 38 Atl. 548; *Beede v. Proehl*, 34 Minn. 497; 27 N. W. 191; *State v. Mooney*, 65 Mo. 494; *Pierce v. Marple*, 148 Pa. St. 69; 33 Am. St. Rep. 808; 23 Atl. 1008; *Drake v. Harrison*, 69 Wis. 99; 2 Am. St. Rep. 717; 33 N. W. 81.

⁸ *Ragland v. Wood*, 71 Ala. 145; 46 Am. Rep. 305.

⁹ *Farmers', etc., Co. v. R. R.*, 127 Ind. 250; 11 L. R. A. 740; 26 N. E. 784.

¹⁰ *Pierce v. Marple*, 148 Pa. St. 69; 33 Am. St. Rep. 808; 23 Atl. 1008.

¹¹ *Oldham v. Kerchner*, 79 N. C. 106; 28 Am. Rep. 302.

¹² *Nipp v. Diskey*, 81 Ind. 214; 42 Am. Rep. 124.

cotton at a certain price per pound, may be discharged by paying the amount of money obtained by multiplying this price by the number of pounds to be delivered.¹³ So under a contract to pay fifteen hundred dollars in wool at twenty cents a pound, the payor may pay the money at his election.¹⁴ If the contract is broken, the debtor loses his right to elect, and the creditor may enforce payment in money.¹⁵ Thus on breach the creditor may enforce payment in money under a contract to pay a certain sum in land,¹⁶ or in merchandise.¹⁷ A bought a bicycle of B, and subsequently, by agreement, returned it, and took from B a receipt for sixty dollars to apply on any new wheel which A should select from B's stock. Subsequently, A selected a wheel for which B refused to honor the receipt as a part payment. A then had a right to recover such amount of money.¹⁸ A agreed to pay for a certain amount of advertising, by allowing the price thereof as a credit upon any steam launch to be selected from such stock. The holder of the order which A gave for such price, transferred it to X. X then bought the launch from A at a price estimated on a cash basis. When X offered the order in part payment, A refused to honor it. It was held that X could recover the amount of such order in money.¹⁹ A debt payable in confectionery becomes payable in money where an order for confectionery is not filled.²⁰ A took a note from B, for value, payable one half in coin, or cotton at twenty cents a pound, at the maker's

¹³ *Sims v. Cox*, 40 Ga. 76; 2 Am. Rep. 560.

¹⁴ *Trowbridge v. Holcomb*, 4 O. S. 38.

¹⁵ *McGillin v. Bennett*, 132 U. S. 445; *Hannan v. Anderson*, 15 Colo. App. 433; 62 Pac. 961; *Brooks v. Hubbard*, 3 Conn. 58; 8 Am. Dec. 154; *Farmers', etc., Co. v. R. R.*, 127 Ind. 250; 11 L. R. A. 740; 26 N. E. 784; *Guthrie v. Wickliffe*, 3 Bibb. (Ky.) 81; *Wyman v. Winslow*, 11 Me. 398; 26 Am. Dec. 542; *Crowl v. Goodenberger*, 112 Mich. 683; 71 N. W. 485; *Hand v. Power Co.*, 167 N. Y. 142; 60 N. E. 425;

New York News Publishing Co. v. Steamship Co., 148 N. Y. 39; 42 N. E. 514; *Haskins v. Dern*, 19 Utah 89; 56 Pac. 953; *Smith v. Coolidge*, 68 Vt. 516; 54 Am. St. Rep. 902; 35 Atl. 432.

¹⁶ *McGillin v. Bennett*, 132 U. S. 445.

¹⁷ *Anderson v. Mason*, 6 Dana (Ky.) 217.

¹⁸ *Hannan v. Anderson*, 15 Colo. App. 433; 62 Pac. 961.

¹⁹ *Hand v. Power Co.*, 167 N. Y. 142; 60 N. E. 425.

²⁰ *Smith v. Coolidge*, 68 Vt. 516; 54 Am. St. Rep. 902; 35 Atl. 432.

option; and one half in coin, or cotton at twenty cents a pound, at the payee's option. After the note fell due it was held that the creditor may recover the entire amount thereof in coin.²¹ A contract specifically giving a party the option to deliver a certain amount in bonds of a corporation to be organized, or of paying the amount in money, such option to be exercised by a certain date, must be performed by delivering the bonds by such date, or else the creditor will have the right to enforce payment in money. Accordingly, delivery of an order upon the treasurer of the company for certain bonds, is not performance where the corporation has not yet issued bonds, and the capital actually invested in the corporate business is very small.²² If an option given in a railroad bond whereby the railroad may pay scrip for the interest on July first of each year is not taken advantage of by that date, the creditor may enforce payment of the interest in money.²³ If a note for one hundred bushels of corn containing a provision "this corn is estimated at twenty dollars," is not paid at maturity the creditor may recover twenty dollars though corn is then worth only fifteen cents a bushel.²⁴ So on breach of a contract to pay a certain amount of money in labor or stock, the payee can on breach recover the amount of money specified.²⁵ B sold a printing outfit to A, agreeing to take payment in printing. A sold the outfit to a third person and refused to do the printing. It was held that B could recover the purchase price.²⁶ If the creditor has a right, by reason of a breach of the contract to demand payment in money, his act in subsequently accepting payment of part of the indebtedness in goods, does not waive his right to enforce payment of the rest in money.²⁷ The minority of the courts, however, treat such contract as merely one to deliver chattels, on the theory that the valuation of the

²¹ Russell v. McCormick, 45 Ala. 587, 6 Am. Rep. 707.

²² Barrett v. Power Co., 118 Fed. 861. So under a contract to pay money or return stock. Patent Tile Co. v. Stratton, 89 Fed. 174.

²³ Texas, etc., Ry. v. Marlcor, 123 U. S. 687.

²⁴ Hise v. Foster, 17 Ia. 23.

²⁵ Sperry v. Johnson, 11 Ohio 452.

²⁶ Wroughton v. Waffle, 122 Ia. 486; 98 N. W. 307.

²⁷ Smith v. Coolidge, 68 Vt. 516; 54 Am. St. Rep. 902; 35 Atl. 432.

consideration in money is introduced simply for determining the amount of the chattels which the debtor is to deliver.²⁸ Where this view prevails the debtor has no election before breach to pay in money,²⁹ and after breach the creditor cannot recover the valuation of the consideration as estimated in money.³⁰ His right of recovery is restricted to damages for non-delivery of the articles agreed to be delivered. Thus in a note "payable in Levee Bonds of Arkansas" at par, the word "payable" means "to be paid," and not "which may be paid." Hence, after the note is due only the value of the bonds can be recovered.³¹ So he can recover the market value of the chattels of greater than the estimate amount in money.³² At Common Law where this theory prevails, recovery must be had on the special contract, and cannot be had on the common counts.³³ On rescission of a contract under which A has delivered horses to B at an agreed valuation in payment for land, B, having sold the horses, must account for them at the market price and not at the agreed valuation.³⁴ Under a contract to accept a certain number of shares of stock in a given corporation in payment of a note, such payment must be made in stock as existing at the time of such contract. Tender of the specified number of shares after the stock has been greatly inflated is not sufficient.³⁵ A note payable in trucking in monthly payments due twenty-four months after date requires trucking to be done each month.³⁶

²⁸ *Mattox v. Craig*, 2 Bibb. (Ky.) 584. (A contract for eighty-nine dollars "to be discharged" in brick at four dollars a thousand.)

²⁹ *Cole v. Ross*, 9 B. Mon. (Ky.) 393; 50 Am. Dec. 517. (A contract for over three thousand dollars payable in pig metal at twenty-nine dollars per ton.)

³⁰ *Wilson v. George*, 10 N. H. 445.

³¹ *Johnson v. Dooley*, 65 Ark. 71; 40 L. R. A. 74; 44 S. W. 1032.

³² *McDonald v. Hodge*, 5 Hayw.

(Tenn.) 85. (A contract to pay a certain sum "in potash at the price of five dollars per hundred.")

³³ A certain amount payable in work. *Wilson v. George*, 10 N. H. 445. A certain amount payable in goods. *Chickering v. Greenleaf*, 6 N. H. 51.

³⁴ *Clover v. Gottlieb*, 50 La. Ann. 568; 23 So. 459.

³⁵ *Tranter v. Hibberd*, 108 Ky. 265; 56 S. W. 169.

³⁶ *Hobbs v. Moore*, 86 Me. 517; 30 Atl. 110.

CHAPTER LXVII.

PAYMENT.

§1393. Nature of payment.

Payment in contract law is that form of performance which consists in the delivery by the promisor and receipt by the promisee of money or something delivered and accepted as the equivalent thereof in discharge of a contractual obligation. If the contract prescribes the method of payment, that method, unless waived, must be at least substantially pursued.¹ Thus if the contract provides for making payment of a penalty by deducting from the last installment due to the contractor, such penalty cannot be enforced if such last payment is never made.² A party cannot be deprived of a right given to him by contract to make payments in a specific manner. Thus A the owner agreed with B the contractor that A should have the right to pay direct to laborers and material men and have such payments credited to his account with B. A cannot be deprived of this right by proceedings in garnishment instituted by B's creditors.³ The original debtor cannot, therefore, be compelled to pay such debt.⁴

§1394. By whom payment may be made.

Payment by one not a party to the contract, if accepted in satisfaction of the obligation of the contract operates as a discharge,¹ even if there is no privity between the party making

¹ *People v. Syracuse*, 144 N. Y. 63; 38 N. E. 1006; *Swift v. New York*, 83 N. Y. 528.

² *Vandegrift v. Engineering Co.*, 161 N. Y. 435; 48 L. R. A. 685; 55 N. E. 941.

³ *Drake v. Harrison*, 69 Wis. 99;

² *Am. St. Rep.* 717; 33 N. W. 81.

⁴ *Crumlish v. Improvement Co.*, 38 W. Va. 390; 45 *Am. St. Rep.* 872; 23 L. R. A. 120; 18 S. E. 456; *Gray v. Herman*, 75 Wis. 453; 6 L. R. A. 691; 44 N. W. 248.

¹ *Crumlish v. Improvement Co.*,

the payment and the debtor, and the debtor is therefore under no obligation to reimburse such third party.² Thus A who had a judgment against B, attached certain bonds of a railroad company. The railroad company wished to retire such bonds and so made an arrangement by which A had the bonds sold, bought them in himself and transferred to X, who acting on behalf of the railroad company, paid part of the judgment in cash and gave notes for the balance. Whatever might be the nature of the transaction between B and X, A was paid and could not recover again from B.³ So A gave a note which was subsequently indorsed by the holder thereof to a bank "for collection." The bank paid the note without consulting A, and then sought to recover from A. As the agreement between the bank and the holder of the note was for payment and not for assignment, the bank could not be treated as the holder of the note.⁴ Neither could the bank recover from A for money expended on his behalf.⁵ If, however, the contract provides for assignment the transaction cannot be treated as payment. Thus where the holder A indorsed "for collection" to B, and B sold to C after cancelling such indorsement, but leaving it still legible, C took with notice and acquired no greater right than B had; but the transaction was not payment.⁶ If payment is a condition precedent, payment by a third person if accepted in satisfaction is sufficient.⁷ So if the premium on an insurance policy must be paid before the policy takes effect, this condition is performed if the agent advances the premium out of his own funds.⁸ But where A agreed severally with X and Y to construct a building for each, adjoining that of the other, and X agreed to pay A half

38 W. Va. 390; 45 Am. St. Rep. 872; 23 L. R. A. 120; 18 S. E. 456; Gray v. Herman, 75 Wis. 453; 6 L. R. A. 691; 44 N. W. 248.

² Gray v. Herman, 75 Wis. 453; 6 L. R. A. 691; 44 N. W. 248.

³ Crumlish v. Improvement Co., 38 W. Va. 390; 45 Am. St. Rep. 372; 23 L. R. A. 120; 18 S. E. 456.

⁴ People's, etc., Bank v. Craig, 63

O. S. 374; 81 Am. St. Rep. 639; 52 L. R. A. 872; 59 N. E. 102.

⁵ See § 832.

⁶ Cussen v. Brandt, 97 Va. 1; 75 Am. St. Rep. 762; 32 S. E. 791.

⁷ Lehman v. Gunn, 124 Ala. 213; 82 Am. St. Rep. 159; 5 L. R. A. 112; 27 So. 475.

⁸ Lehman v. Gunn, 124 Ala. 213; 82 Am. St. Rep. 159; 51 L. R. A. 112; 27 So. 475.

the cost of the party-wall, while Y agreed to pay A the entire cost of such wall, X's payment of his proportion does not discharge Y from paying the entire amount.⁹

§1395. To whom payment may be made.

The question, who is authorized to receive payment so as to discharge the obligation, usually turns on questions of ownership and agency, and is related to contract only collaterally. Payment to the original payee of a negotiable instrument, is not discharged as to an indorsee for value before maturity and without notice.¹ The maker is not discharged by payment to the payee without surrender of the note even if the indorsee and payee had agreed to conceal the fact of the transfer from such maker.² So the maker cannot pay the original payee after maturity after notice to the maker of assignment.³ If a note is assigned but not indorsed, it has been held that payment to the original payee is a discharge, although the note is not produced.⁴ Whether payment to an agent of the creditor is a discharge of the debt, is determined by questions of agency. If the funds thus paid in actually reach the hands of the creditor, the debt is of course discharged, even if the agent to whom payment was made had no authority to receive such payment. An agent authorized to receive payment has no authority to accept payment in anything but money. Hence he cannot receive corporate stock.⁵ An agent authorized to collect overdue interest, who does not have possession of the instrument evidencing the indebtedness, has no authority to receive payment of the debt, and payment to him is not therefore a discharge. The bank at which a note is made payable, is not thereby made an agent of the creditor. Accordingly, a deposit

⁹ Meyer v. Stadtler, 23 Tex. Civ. App. 432; 56 S. W. 108.

¹ Wilson v. Campbell, 110 Mich. 580; 35 L. R. A. 544; 68 N. W. 278; Hollinshead v. Stuart, 8 N. D. 35; 42 L. R. A. 659; 77 N. W. 89.

² Tuck v. Bank, 108 Ga. 446; 75 Am. St. Rep. 69; 33 S. E. 983.

³ Mackay v. Church, 15 R. I. 121; 2 Am. St. Rep. 881; 23 Atl. 108.

⁴ Vann v. Marbury, 100 Ala. 438; 46 Am. St. Rep. 70; 23 L. R. A. 325; 14 So. 273.

⁵ Bank v. Hart, 37 Neb. 197; 40 Am. St. Rep. 479; 20 L. R. A. 780; 55 N. W. 631.

in such bank by the debtor for the purpose of paying such note, is not of itself payment.⁶ So a deposit by a debtor in a bank to the account of his creditor is not payment unless he consents thereto, since the bank is the agent of the debtor.⁷ Payment to an administrator of the creditor appointed by the Probate Court of decedent's domicile, is a discharge of the debt. An executor under a will made during a temporary visit to another state, to whom the note has been given for safe keeping, cannot enforce payment thereof.⁸ Since the statute forbidding assignments of claims against the government in certain cases, is intended solely for the benefit of the government, payment by the government to the assignee will discharge its liability to the assignor.⁹ Payment of a salary to a *de facto* officer, is no discharge of the liability of the public corporation to the *de jure* officer entitled thereto.¹⁰

§1396. Payment in something other than money.—Effect of express agreement.

Payment is presumed to be made in money unless an intent to the contrary is shown.¹ If something other than money is delivered by the debtor to the creditor it is possible that it may be delivered as absolute payment on the one hand or as collateral security or conditional payment on the other. If there is an agreement that it is taken as payment, it has such effect.²

⁶ St. Paul National Bank v. Cannon, 46 Minn. 95; 24 Am. St. Rep. 189; 48 N. W. 526; Kohl v. Beach, 107 Wis. 409; 50 L. R. A. 600; 83 N. W. 657.

⁷ Hill v. Arnold, 116 Ga. 45; 42 S. E. 475.

⁸ Bull v. Fuller, 78 Ia. 20; 16 Am. St. Rep. 419; 42 N. W. 572.

⁹ Lopez v. United States, 24 Ct. Cl. 84; 2 L. R. A. 571.

¹⁰ Rasmussen v. Carbon County, 8 Wyo. 277; 44 L. R. A. 295; 56 Pac. 1098. *Contra*, Coughlin v. McElroy, 74 Conn. 397; 92 Am. St. Rep. 224; 50 Atl. 1025. (An action

by the *de jure* officer against the *de facto* officer.)

¹ Fell v. Poultry Co., 69 N. J. L. 429; 55 Atl. 236.

² Railroad bonds. Reynolds v. Ry., 143 Ind. 579; 40 N. E. 410. County warrants and promissory notes. Pasewalk v. Bollman, 29 Neb. 519; 26 Am. St. Rep. 399; 45 N. W. 780. Note of one of joint-debtors. Sheehy v. Mandeville, 6 Cranch (U. S.) 253. Check of debtor. La Fayette County Monument Corporation v. Magoon, 73 Wis. 627; 3 L. R. A. 761; 42 N. W. 17. Check of debtor in hands of *bona fide* holder. Na-

On the other hand it may be understood between the parties that it is delivered not as payment, but as collateral security.³ It is a question of fact whether the thing delivered by the debtor to the creditor is delivered as payment or not.⁴ Thus where a mortgagor gives his bond for an overdue payment on a mortgage debt,⁵ or notes of a third person,⁶ as where the note of a third person is given for an indebtedness under a building contract,⁷ the question is ultimately one of fact. Railroad coupons secured by first mortgage, which are accepted at par in buying third mortgage bonds at sixty cents on the dollar, the interest on which is guaranteed by a third party, are to be considered as paid.⁸

§1397. Presumption as to effect of assignment of non-negotiable right.

The greatest difficulty involved in this topic is to determine what presumption arises when the debtor delivers a thing of value to his creditor. Upon this question there is the greatest divergence of authority. The same state may furthermore treat one kind of instrument as *prima facie* payment and another kind as *prima facie* collateral security only. The general weight of authority is that anything of value delivered by the debtor to the creditor is *prima facie* collateral security only and not payment. This principle has been applied where a

tional Park Bank v. Levy Bros., 17 R. I. 746; 19 L. R. A. 475; 24 Atl. 777.

³ Granite National Bank v. Fitch, 145 Mass. 567; 1 Am. St. Rep. 484; 14 N. E. 650.

⁴ The Kimball, 3 Wall. (U. S.) 37; Layman v. Bank, 12 How. (U. S.) 225; Quimby v. Durgin, 148 Mass. 104; 1 L. R. A. 514; 19 N. E. 14; Goodall v. Norton, 88 Minn. 1; 92 N. W. 445; Terry v. Robbins, 128 N. C. 140; 83 Am. St. Rep. 663; 38 S. E. 470; Shepherd v. Busch, 154 Pa. St. 149; 35 Am. St. Rep. 815;

26 Atl. 363; Rogers-Ruger Co. v. McCord, 115 Wis. 261; 91 N. W. 685.

⁵ Terry v. Robbins, 128 N. C. 140; 83 Am. St. Rep. 663; 38 S. E. 470.

⁶ Shepherd v. Busch, 154 Pa. St. 149; 35 Am. St. Rep. 815; 26 Atl. 363. And see Lyons v. Bank, 86 Ga. 485; 12 L. R. A. 155; 12 S. E. 882.

⁷ Quimby v. Durgin, 148 Mass. 104; 1 L. R. A. 514; 19 N. E. 14.

⁸ Fidelity, etc., Co. v. R. R., 86 Va. 1; 19 Am. St. Rep. 858; 9 S. E. 759.

note was given for the debt,¹ either the note of the debtor,² or of one of joint debtors,³ or of a third person.⁴ If the debtor delivers property to his creditor or performs services for him, this is not *prima facie* payment.⁵ If the debtor buys realty in the name of his creditor and pays for it this is not *prima facie* payment of the debt.⁶ If the delivery of the property is on account of the debt, it is *prima facie* collateral security,⁷ and if not, the delivery of the property or rendition of the services may give a right of action to the debtor but does not amount to payment.⁸ Independent demands in favor of a debtor as against a creditor may give the right of set-off, but do not by operation of law amount to payment.⁹ Assignments of non-negotiable choses in action are *prima facie*, not absolute payment.¹⁰ So a non-negotiable order is not *prima facie* absolute payment.¹¹

§1398. Presumption as to transfer of negotiable instrument.— Absolute payment not presumed.

Delivery of a promissory note,¹ whether executed by the

¹ Johnston v. Barrills, 27 Or. 251; 50 Am. St. Rep. 717; 41 Pac. 656.

² London, etc., Bank v. Parratt, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164.

³ Coleman v. Whitney, 62 Vt. 123; 9 L. R. A. 517; 20 Atl. 322.

⁴ Caldwell v. Hall, 49 Ark. 508; 4 Am. St. Rep. 64; 1 S. W. 62; Dugan v. Broom Co., 6 Wash. 593; 36 Am. St. Rep. 182; 34 Pac. 157; Mansfield v. Dameron, 42 W. Va. 794; 57 Am. St. Rep. 884; 26 S. E. 527.

⁵ Borland v. Bank, 99 Cal. 89; 37 Am. St. Rep. 32; 33 Pac. 737.

⁶ Feder v. Ervin (Tenn. Ch. App.), 36 L. R. A. 335.

⁷ Grant v. School Town, 71 Ind. 58.

⁸ Green v. Disbrow, 79 N. Y. 1; 35 Am. Rep. 496.

⁹ Borland v. Bank, 99 Cal. 89; 37

Am. St. Rep. 32; 33 Pac. 737; Burton v. Willin, 6 Houst. (Del.) 522; 22 Am. St. Rep. 363; Rugland v. Thompson, 48 Minn. 539; 51 N. W. 604; White v. Benjamin, 138 N. Y. 623; 33 N. E. 1037.

¹⁰ Sutphen v. Cushman, 35 Ill. 186; Wade v. Curtis, 96 Me. 309; 52 Atl. 762; Leas v. James, 10 S. & R. (Pa.) 307.

¹¹ Darby v. Miller, 116 Ga. 952; 43 S. E. 374; Proctor v. Mather, 3 B. Mon. (Ky.) 353; Bond v. McMahon, 94 Mich. 557; 54 N. W. 281; Colby v. Maw, 1 Neb. (Unofficial) 478; 95 N. W. 677; Chicago, etc., Ry. v. Burns, 61 Neb. 793; 86 N. W. 483; J. Weller Co. v. Washington, 24 Ohio C. C. 407; Estey v. Birnbaum, 9 S. D. 174; 68 N. W. 290; Cliver v. Heil, 95 Wis. 364; 70 N. W. 346.

¹ Atlas Steamship Co. v. Land Co.,

debtor,² or by a third person,³ as the executor of the debtor,⁴ has been held not to be absolute payment *prima facie* of an antecedent debt. Thus where A was indebted to B on a contract for plastering and paid four hundred twenty-five dollars in cash and gave two notes executed by C, and B gave to A his receipt for fourteen hundred five dollars "on account contract for plastering," it was held that the notes were *prima facie* conditional payment only, and the verdict of the jury

102 Fed. 358; 42 C. C. A. 398; Bank v. Parratt, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164; Jansen v. Grimshaw, 125 Ill. 468; 17 N. E. 850; Stone v. Church, 92 Ill. App. 77; Dean v. Ridgeway, 82 Ia. 757; 48 N. W. 923; Kibbey v. Jones, 7 Bush. (Ky.) 243; Valade v. Masson, — Mich. —; 97 N. W. 59; Germain v. Lumber Co., 116 Mich. 245; 74 N. W. 644; H. F. Cady Lumber Co. v. Exposition Co. (Neb.), 93 N. W. 961; Lokken v. Miller, 9 N. D. 512; 84 N. W. 368; Sutliff v. Atwood, 15 O. S. 186; Price v. Coblitz, 21 Ohio C. C. 732; Berlin Iron Bridge Co. v. Bonta, 180 Pa. St. 448; 36 Atl. 867; Grissel v. Bank, 12 S. D. 93; 80 N. W. 161; Baker v. Baker, 2 S. D. 261; 39 Am. St. Rep. 776; 49 N. W. 1064; Cushwa v. Building Association, 45 W. Va. 490; 32 S. E. 259; Nash v. Meggett, 89 Wis. 486; 61 N. W. 283. "A promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment." The Kimball, 3 Wall. (U. S.) 37, 45; quoted in Segrist v. Crabtree, 131 U. S. 287, 290.

² Caldwell v. Hall, 49 Ark. 508; 4 Am. St. Rep. 64; 1 S. W. 62; Merrill v. Kenyon, 48 Conn. 314; 40 Am. Rep. 174; Topeka Capital Co. v. Merriam, 60 Kan. 397; 56 Pac. 757; Bradley v. Harwi, 43 Kan. 314; 23 Pac. 566; Miller v. McCarty, 47 Minn. 321; 28 Am. St. Rep. 375; 50 N. W. 235; Starling v. Wyatt (Miss.), 27 So. 526; Fry v. Patterson, 49 N. J. L. 612; 10 Atl. 390; Merrick v. Boury, 4 O. S. 60; Matteson v. Ellsworth, 33 Wis. 488; 14 Am. Rep. 766.

³ Wilhelm v. Schmidt, 84 Ill. 183; Kruse v. Lumber Co., 108 Ia. 352; 79 N. W. 118; Webb v. Bank, 67 Kan. 62; 72 Pac. 520; Gillett v. Knowles, 108 Mich. 602; 66 N. W. 497; Chamberlain Banking House v. Wolsey, 60 Neb. 516; 83 N. W. 729; American, etc., Co. v. Drinkhouse, 59 N. J. L. 462; 36 Atl. 1034; Smith v. Ryan, 66 N. Y. 352; 23 Am. Rep. 60; Terry v. Robbins, 128 N. C. 140; 83 Am. St. Rep. 663; 38 S. E. 470; Collins v. Busch, 191 Pa. St. 549; 43 Atl. 378; Shepherd v. Busch, 154 Pa. St. 149; 35 Am. St. Rep. 815; 26 Atl. 363; Perry v. Williamson (Tenn.), 56 S. W. 826; Duggan v. Broom Co., 6 Wash. 593; 36 Am. St. Rep. 182; 34 Pac. 157; Willow River Lumber Co. v. Furniture Co., 102 Wis. 636; 78 N. W. 762.

⁴ Peter v. Beverly, 10 Pet. (U. S.) 532.

that they were not taken in absolute payment will not be disturbed.⁵ Delivery of a note and chattel mortgage has been held not *prima facie* payment of a debt secured by mortgage,⁶ nor is delivery of a bond *prima facie* payment of an overdue installment of interest on a debt secured by mortgage.⁷ Even if the instrument is taken as conditional payment only, failure to present it to the maker at maturity converts it into absolute payment.⁸ Delivery of negotiable instrument has been held not to be payment of a contemporaneously created debt,⁹ whether the notes were executed by the debtor¹⁰ or by a third party.¹¹ Delivery of a draft, whether drawn by the debtor¹² or by a third person,¹³ is not according to the weight of authority *prima facie* payment of an antecedent debt. Some courts, however, treat a draft as *prima facie* payment of an antecedent debt.¹⁴ Delivery of a draft has been held to be *prima facie* payment of a contemporaneous debt.¹⁵ Omission of the creditor to use proper diligence in collecting the draft,¹⁶ will make the draft operate as a payment to the extent of the injury thus caused. Delivery of a check, either one drawn by

⁵ *Shepherd v. Busch*, 154 Pa. St. 149; 35 Am. St. Rep. 815; 26 Atl. 363.

⁶ *Baker v. Baker*, 2 S. D. 261; 39 Am. St. Rep. 776; 49 N. W. 1064.

⁷ *Terry v. Robbins*, 128 N. C. 140; 83 Am. St. Rep. 663; 38 S. E. 470.

⁸ *Coleman v. Lewis*, 183 Mass. 485; 97 Am. St. Rep. 450; 67 N. E. 603.

⁹ *Segrist v. Crabtree*, 131 U. S. 287; *Carlin v. Heller*, 34 Ia. 256; *Hoeflinger v. Wells*, 47 Wis. 628; 3 N. W. 589.

¹⁰ *Segrist v. Crabtree*, 131 U. S. 287; *Lyman v. Bank*, 12 How. (U. S.) 225.

¹¹ *Shriner v. Keller*, 25 Pa. St. 61.

¹² *The Emily Souder*, 17 Wall. (U. S.) 666; *The Bird of Paradise*, 5 Wall. 545; *Flannery v. Harley*, 117

Ga. 483; 43 S. E. 765; *Hodgen v. Latham*, 33 Ill. 344; *Holdsworth v. De Belaunzaran*, 106 N. Y. 119; 12 N. E. 615; *League v. Waring*, 85 Pa. St. 244; *Estey v. Birnbaum*, 9 S. D. 174; 68 N. W. 290.

¹³ *Brown v. Olmstead*, 50 Cal. 162; *National Life Ins. Co. v. Goble*, 51 Neb. 5; 70 N. W. 503.

¹⁴ *Smith v. Bettger*, 68 Ind. 254; 34 Am. Rep. 256; *Bangor v. Warren*, 34 Me. 324; 56 Am. Dec. 657; *Arnold v. Sprague*, 34 Vt. 402; *Schierl v. Baumel*, 75 Wis. 69; 43 N. W. 724.

¹⁵ *Hall v. Stevens*, 116 N. Y. 201; 5 L. R. A. 802; 22 N. E. 374.

¹⁶ *Whitney v. Esson*, 99 Mass. 308; 96 Am. Dec. 762; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; 83 Am. Dec. 756; *Allan v. Eldred*, 50 Wis. 132; 6 N. W. 565.

the debtor,¹⁷ even if certified,¹⁸ or by a third person,¹⁹ is *prima facie* not payment. Thus A sold wheat to B and gave B a bill of lading. B delivered to A therefor his check on a bank in which he had not funds to meet such check. B indorsed the bill of lading over to the bank, which took with knowledge of the facts. The check was not paid. It was held that the vendor could retake the goods from the bank.²⁰ Under somewhat similar facts the vendor was allowed to retake the goods even from an innocent holder of the bill of lading.²¹ If, however, the payee of a check has it certified,²² or fails to present it for payment promptly whereby the indorser is damaged through the subsequent insolvency of the maker,²³ or deposits the check to his own credit even though he does not check

¹⁷ *Morris v. Bank*, 122 Ala. 580; 25 So. 499; *Steiner v. Jeffries*, 118 Ala. 573; 24 So. 37; *Steinhart v. Bank*, 94 Cal. 362; 28 Am. St. Rep. 132; 29 Pac. 717; *Angus v. Bank*, 170 Ill. 298; 48 N. E. 946; affirming 68 Ill. App. 425; *Burrows v. State*, 137 Ind. 474; 45 Am. St. Rep. 210; 37 N. E. 271; *People's Savings Bank v. Gifford*, 108 Ia. 277; 79 N. W. 63; *Carter v. Richardson (Ky.)*, 60 S. W. 397; *Williamson v. Mfg. Co.*, 169 Mass. 374; 47 N. E. 1020; *Baumgardner v. Henry*, 131 Mich. 240; 91 N. W. 169; *Goodall v. Norton*, 88 Minn. 1; 92 N. W. 445; *National Bank v. R. R.*, 44 Minn. 224; 20 Am. St. Rep. 566; 9 L. R. A. 263; 46 N. W. 342, 560; *Johnson-Brinkman Co. v. Bank*, 116 Mo. 558; 38 Am. St. Rep. 615; 22 S. W. 813; *National Life Ins. Co. v. Goble*, 51 Neb. 5; 70 N. W. 503; *Nason v. Fowler*, 70 N. H. 291; 47 Atl. 263; *Thomas v. Westchester County*, 115 N. Y. 47; 4 L. R. A. 477; 21 N. E. 674; *Thomson v. Bank*, 82 N. Y. 1; *Fleig v. Sleet*, 43 O. S. 53; 54 Am. Rep. 800; 1 N. E. 24; *Springfield v. Green*, 7 Baxt. (Tenn.) 301.

¹⁸ *Bickford v. Bank*, 42 Ill. 238;

89 Am. Dec. 436; *Born v. Bank*, 123 Ind. 78; 18 Am. St. Rep. 312; 7 L. R. A. 442; 24 N. E. 173; *Cincinnati, etc., Co. v. Bank*, 51 O. S. 106; 46 Am. St. Rep. 560; 36 N. E. 833; *Andrews v. Bank*, 9 Heisk. (Tenn.) 211; 24 Am. Rep. 300.

¹⁹ *Mordis v. Kennedy*, 23 Kan. 408; 33 Am. Rep. 169; *Weddigen v. Fabric Co.*, 100 Mass. 422; *Carroll v. Sweet*, 128 N. Y. 19; 13 L. R. A. 43; 27 N. E. 763; *Holmes v. Briggs*, 131 Pa. St. 233; 17 Am. St. Rep. 804; 18 Atl. 928.

²⁰ *Johnson-Brinkman Co. v. Bank*, 116 Mo. 558; 38 Am. St. Rep. 615; 22 S. W. 813.

²¹ *National Bank v. R. R.*, 44 Minn. 224; 20 Am. St. Rep. 566; 9 L. R. A. 263; 46 N. W. 342, 560.

²² *Metropolitan National Bank v. Jones*, 137 Ill. 634; 31 Am. St. Rep. 403; 12 L. R. A. 492; 27 N. E. 533.

²³ *Downey v. Hicks*, 14 How. (U. S.) 240; *Watts v. Gan*, 114 Ala. 264; 62 Am. St. Rep. 99; 21 So. 1011; *Carroll v. Sweet*, 128 N. Y. 19; 13 L. R. A. 43; 27 N. E. 763; *Hodgson v. Barrett*, 33 O. S. 63; 31 Am. Rep. 527.

against it,²⁴ he thereby accepts it in payment. The creditor must therefore show either that the check was returned or that it was duly presented but not paid.²⁵ So payment was held to exist where A gave B a check on a bank Y in which A had funds; and B deposited it in his bank X, which gave him credit therefor and sent it to Y which gave X credit therefor.²⁶ If A an attorney for a creditor receives funds from the debtor and the debtor agrees that the attorney shall send his check to the creditor for such debt, this constitutes payment.²⁷ If a note is indorsed to a bank for collection a check on the indorsing bank drawn by one who has an account therein is payment.²⁸ A cashier's check²⁹ is not *prima facie* payment, though if there is any evidence tending to show that it was so accepted it is error to withdraw such question from the jury.³⁰ The fact that the creditor does not give immediate notice of dishonor but waits and collects a dividend out of the estate of the drawer bank is not conclusive that payment was intended.³¹ A certificate of deposit, indorsed by the debtor to the creditor, is not *prima facie* payment,³² and the creditor need not protest such certificate for non-payment to hold the debtor.³³ Delivery of a time certificate, as where it is executed

²⁴ Board of Education v. Robinson, 81 Minn. 305; 83 Am. St. Rep. 374; 84 N. W. 105. In this case the check was deposited in the bank on which it was drawn, which was then insolvent, but a going concern, and which failed before such deposit was checked out.

²⁵ Goodall v. Norton, 88 Minn. 1; 92 N. W. 445.

²⁶ Smith, etc., Co. v. Mitchell, 117 Ga. 772; 97 Am. St. Rep. 217; 45 S. E. 47. (The fact that after the cancelled check had been surrendered to A by Y, Y asked for it, received it from A, and then protested it, does not destroy the effect of payment.)

²⁷ Millhiser v. Marr, 128 N. C. 318; 38 S. E. 887.

²⁸ Sayles v. Cox, 95 Tenn. 579; 49 Am. St. Rep. 940; 32 L. R. A. 715; 32 S. W. 626.

²⁹ Holmes v. Briggs, 131 Pa. St. 233; 17 Am. St. Rep. 804; 18 Atl. 928; s. c., *sub nomine*, Briggs v. Holmes, 118 Pa. St. 283; 4 Am. St. Rep. 597; 12 Atl. 355.

³⁰ Briggs v. Holmes, 118 Pa. St. 283; 4 Am. St. Rep. 597; 12 Atl. 355.

³¹ Holmes v. Briggs, 131 Pa. St. 233; 17 Am. St. Rep. 804; 18 Atl. 928.

³² Leake v. Brown, 43 Ill. 372; Duquette v. Richar, 102 Mich. 483; 60 N. W. 974; Gallagher v. Ruffing, 118 Wis. 284; 95 N. W. 117.

³³ Gallagher v. Ruffing, 118 Wis. 284; 95 N. W. 117.

by one of several joint debtors,³⁴ is not *prima facie* payment.

§1399. Payment presumed.

In other jurisdictions a promissory note,¹ executed by the debtor or by another person,² as at a higher rate of interest than the original indebtedness,³ has been held to be *prima facie* payment of an antecedent debt. So a note given for a contemporaneous debt has been held in these jurisdictions to be *prima facie* payment.⁴ Even in such jurisdictions it is not a matter of law, but of fact, to go to the jury with the evidence.⁵ Even where the debtor's notes are *prima facie* payment the vendor who has taken such notes may still exercise the right of stoppage *in transitu* if the vendee becomes insolvent.⁶ It is necessary for the vendor only to tender such note in court. Even where a note is *prima facie* payment in most instances, it is not so where the original debt is secured by mortgage.⁷ Even in jurisdictions which treat a note as ordinarily not *prima facie* payment, a note of a third person given by the holder thereof for a debt created by himself at the time of such transfer is held to be *prima facie* payment.⁸

³⁴ Chase v. Brundage, 58 O. S. 517; 51 N. E. 31.

¹ Bradway v. Groenendyke, 153 Ind. 508; 55 N. E. 434; Sutton v. Baldwin, 146 Ind. 361; 45 N. E. 518; Scott v. Edgar (Ind. App.), 60 N. E. 468; Bryant v. Grady, 98 Me. 389; 57 Atl. 92; Bunker v. Barron, 79 Me. 62; 1 Am. St. Rep. 282; 8 Atl. 253; Davis v. Parsons, 157 Mass. 584; 32 N. E. 1117; Quimby v. Durgin, 148 Mass. 104; 1 L. R. A. 514; 19 N. E. 14; Wemet v. Lime Co., 46 Vt. 460.

² Dick v. Flanagan, 122 Ind. 277; 7 L. R. A. 590; 23 N. E. 765; Union Ins. Co. v. Grant, 68 Me. 229; 28 Am. Rep. 42; Goodnow v. Hill, 125 Mass. 587.

³ Dick v. Flanagan, 122 Ind. 277; 7 L. R. A. 590; 23 N. E. 765.

⁴ Thompson v. Peck, 115 Ind. 512; 1 L. R. A. 201; 18 N. E. 16.

⁵ Quimby v. Durgin, 148 Mass. 104; 1 L. R. A. 514; 19 N. E. 14.

⁶ Brewer Lumber Co. v. R. R., 179 Mass. 228; 88 Am. St. Rep. 375; 54 L. R. A. 435; 60 N. E. 548.

⁷ Bunker v. Barron, 79 Me. 62; 1 Am. St. Rep. 282; 8 Atl. 253.

⁸ Wright v. Crockery Ware Co., 1 N. H. 281; 8 Am. Dec. 68; Youngs v. Stahelin, 34 N. Y. 258; Challoner v. Boyington, 91 Wis. 27; 64 N. W. 422; s. c., 83 Wis. 399; 53 N. W. 694.

§1400. Payment in genuine but worthless bank-notes.

If the debtor makes payment to his creditor in genuine bank-notes which are, however, worthless, usually because of the insolvency of the bank issuing them, where neither debtor nor creditor know of the insolvency of the bank, a conflict of authority as to the validity of such payment exists. The weight of authority holds that such payment is a nullity, if made after the bank has stopped payment,¹ provided the creditor gives reasonable notice to the debtor of the fact that such notes are worthless.² A strong minority of the courts, however, hold that such a payment is valid; and that the loss must fall upon the creditor.³ If the debtor knows that the bank is insolvent and the creditor is ignorant of such fact, the loss must fall on the debtor, and the payment is in legal effect a nullity.⁴

§1401. Payment in counterfeit money.

Payment in counterfeit money is no payment in law and the debtor is not thereby discharged from his indebtedness

¹ *Frontier Bank v. Morse*, 22 Me. 88; 38 Am. Dec. 284; *Ontario Bank v. Lightbody*, 13 Wend. (N. Y.) 101; 27 Am. Dec. 179; affirming *Lightbody v. Bank*, 11 Wend. (N. Y.) 9; *Westfall v. Braley*, 10 O. S. 188; 75 Am. Dec. 509; *Wainwright v. Webster*, 11 Vt. 576; 34 Am. Dec. 707; *Townsend v. Bank*, 7 Wis. 185. "So long as they (bank notes) are *in fact* what they purport to be, *payable on demand*, common consent gives them the ordinary attributes of money. But upon the *failure* of the bank by which they were issued, when its doors are closed, and its inability to redeem its bills is openly avowed, they instantly lose the character of money, their circulation as currency ceases with the usage and consent upon which it rested and the notes become the mere dishonored and depreciated evidences of debt. When this change in their character takes place, the loss must necessarily

fall upon him who is the owner of them at the time; and this, too, whether he is aware or unaware of the fact. His ignorance of the fact can give him no right to throw the loss which he has already incurred upon an innocent third party." *Westfall, etc., Co. v. Braley*, 10 O. S. 188, 191; 75 Am. Dec. 509.

² *Corbit v. Bank*, 2 Harr. (Del.) 235; 30 Am. Dec. 635; *Magee v. Carmack*, 13 Ill. 289.

³ *Lowrey v. Murrell*, 2 Port. (Ala.) 280; 27 Am. Dec. 651; *Bayard v. Shunk*, 1 W. & S. (Pa.) 92; 37 Am. Dec. 441; *Ware v. Street*, 2 Head. (Tenn.) 609; 75 Am. Dec. 755; *Scruggs v. Gass*, 8 Yerg. (Tenn.) 175; 29 Am. Dec. 114. See *obiter*, *Young v. Adams*, 6 Mass. 182.

⁴ *Commonwealth v. Stone*, 4 Met. (Mass.) 45; *Hellings v. Hamilton*, 4 W. & S. (Pa.) 462.

though he pays it in good faith.¹ The same principle applies to payment in cancelled United States Treasury notes.² The exception to this rule is the case where a bank receives counterfeit notes which purport to be its own issue. As it is bound to know its own currency, it is bound by such payment.³ While this principle is recognized in all the books, the cases cited in its support are those in which, as indicated below, the same result might have been reached had the notes been those of another bank. In any event the creditor must give notice to the debtor within a reasonable time that the money was counterfeit, to prevent the payment from binding him.⁴ Even under an agreement to receive a note⁵ as payment, delivery of a forged instrument is no payment. The surety on the original instrument is therefore not discharged.⁶

¹ *Jones v. Ryde*, 5 Taunt. 488; *Watson v. Cresap*, 1 B. Mon. (Ky.) 195; 36 Am. Dec. 572; *Atwood v. Cornwall*, 28 Mich. 336; 15 Am. Rep. 219; s. c., 25 Mich. 142; *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; 3 Am. Dec. 446; *Ware v. Street*, 2 Head. (Tenn.) 609; 75 Am. Dec. 755.

² *United States v. Morgan*, 11 How. (U. S.) 154. (The customs collector was here held liable to the United States for such payments received by him.)

³ *United States Bank v. Bank*, 10 Wheat. (U. S.) 333. In this case there is the complicating fact that the receiving bank was negligent, as examination of the notes would have shown that they bore serial numbers different from any of that

denomination issued by that bank. In *Gloucester Bank v. Bank*, 17 Mass. 33, the additional fact existed that no notice was given of the doubtful character of the notes for fifteen days and no actual averment of forgery for fifty days.

⁴ *Lawrenceburgh National Bank v. Stevenson*, 51 Ind. 504; *Raymond v. Baar*, 13 S. & R. (Pa.) 318; 15 Am. Dec. 603; *McDonald v. Allen*, 8 Baxt. (Tenn.) 446.

⁵ *West Philadelphia National Bank v. Field*, 143 Pa. St. 473; 24 Am. St. Rep. 562; 22 Atl. 829; *Bank v. Buchanan*, 87 Tenn. 32; 10 Am. St. Rep. 617; 1 L. R. A. 199; 9 S. W. 202.

⁶ *Bank v. Buchanan*, 87 Tenn. 32; 10 Am. St. Rep. 616; 1 L. R. A. 199; 7 S. W. 202.

CHAPTER LXVIII.

APPROPRIATION OF PAYMENTS.

§1402. Voluntary payments.—Appropriation by debtor.

If a debtor is indebted to his creditor upon two or more distinct debts, and a payment is made by the debtor or upon his behalf to the creditor, it often is important to determine upon which of such debts such payment applies. If the debtor makes the payment voluntarily and out of his own funds, he has the right to direct the application of such payments.¹ He may direct the payment to be applied to an illegal demand in preference to a legal one,² or to a debt secured by mortgage,³ or by personal security of others,⁴ in preference to an unsecured debt, or con-

¹ *The Mecca* (1897), App. Cas. 286; *National Bank v. Bank*, 94 U. S. 437; *Tayloe v. Sandiford*, 7 Wheat. (U. S.) 13; *Turrentine v. Grigsby*, 118 Ala. 380; 23 So. 666; *Pearce v. Walker*, 103 Ala. 250; 15 So. 568; *Murdock v. Clarke*, 88 Cal. 384; 26 Pac. 601; *Perot v. Cooper*, 17 Colo. 80; 31 Am. St. Rep. 258; 28 Pac. 391; *Lodge v. Ainscow*, 1 Penne. (Del.) 327; 41 Atl. 187; *First National Bank v. Hollinsworth*, 78 Ia. 575; 6 L. R. A. 92; 43 N. W. 536; *Howard v. Mfg. Co. (Ky.)*, 72 S. W. 771; *Haynes v. Wilson (Ky.)*, 55 S. W. 209; *McDaniel v. Barnes*, 5 Bush. (Ky.) 183; *Richardson v. Woodbury*, 12 Cush. (Mass.) 279; *Hall v. Marston*, 17 Mass. 575; *Grasser, etc., Co. v. Rogers*, 112 Mich. 112; 67 Am. St. Rep. 389; 70 N. W. 445; *Beck v. Haas*, 111 Mo. 264; 33 Am. St. Rep. 516; 20 S. W. 19; *City of Lincoln v. Ry.*, — Neb. —; 93 N.

W. 766; *Murray v. Schneider*, 64 Neb. 484; 90 N. W. 206; *Leeds v. Gifford*, 41 N. J. Eq. 464; 5 Atl. 795; *Stewart v. Hopkins*, 30 O. S. 502; *Trullinger v. Kofoed*, 7 Or. 228; 33 Am. Rep. 708; *Stebbins v. Lardner*, 2 S. D. 127; 48 N. W. 847; *Phillips v. Herndon*, 78 Tex. 378; 22 Am. St. Rep. 59; 14 S. W. 857; *Pope v. Ice Co.*, 91 Va. 79; 20 S. E. 940; *Hassard v. Tomkins*, 108 Wis. 186; 84 N. W. 174.

² *Smith v. Coopers*, 9 Ia. 376; *Richardson v. Woodbury*, 12 Cush. (Mass.) 279; *Feldman v. Gamble*, 26 N. J. Eq. 494.

³ *Massengale v. Pounds*, 108 Ga. 762; 33 S. E. 72; *Plain v. Roth*, 107 Ill. 588; *First National Bank v. Prior*, 10 N. D. 146; 86 N. W. 362; *Stewart v. Hopkins*, 30 O. S. 502; *Patterson v. Van Loon*, 186 Pa. St. 367; 40 Atl. 495.

⁴ *Eppinger v. Kendrick*, 114 Cal. 620; 46 Pac. 613; affirming in banc,

trary to equitable principles.⁵ The payment is in law regarded as being applied as the debtor directs, even if the creditor has in fact made a different application thereof.⁶ If the debtor and creditor have once agreed upon an application of a payment, the creditor cannot afterwards change it.⁷ If the debtor directs a payment to be appropriated to a debt not yet due, the creditor may refuse to accept such payment; but if he accepts it, it must be appropriated as directed.⁸ So if it is understood that payments by one person are to be applied to an account due from another, payments made on such account can not be subsequently applied by the creditor to another account, though he might at the outset have refused to accept payment from any person except from the original debtor.⁹ If a payment has been made on an entire contract, it cannot afterwards be applied to specific items.¹⁰ If the debtor intends a specific application of a payment made by him, he must notify the creditor of his intention.¹¹ An entry or memorandum made by the debtor and not brought to the attention of the creditor is not a sufficient application.¹² Whether the creditor must notify the debtor of an application made by himself is a question on which there is some conflict of authority, though the weight of authority is that such notice must be given to constitute an appropriation.¹³ If the creditor enters the payments on a general account with the debtor so as, in law, to amount to an application to the earliest items, his secret and uncom-

44 Pac. 234; *Huntington, etc., Association v. Cast*, 160 Ind. 701; 67 N. E. 921.

⁵ (*City of*) *Lincoln v. Ry.*, — Neb. —; 93 N. W. 766.

⁶ *Reid v. Wells*, 56 S. C. 435; 34 S. E. 401; rehearing denied, 34 S. E. 939.

⁷ *Miller v. Womble*, 122 N. C. 35; 29 S. E. 102; *Reid v. Wells*, 56 S. C. 435; 34 S. E. 401.

⁸ *Wetherell v. Joy*, 40 Me. 325.

⁹ *National Cash Register Co. v. Bonneville*, 119 Wis. 222; 96 N. W. 558.

¹⁰ *Seannell v. Brewing Co.*, 178 Mass. 288; 59 N. E. 628.

¹¹ *Long v. Miller*, 93 N. C. 233; *Hill v. Southerland*, 1 Wash. (Va.) 128.

¹² *Terhune v. Colton*, 12 N. J. Eq. 232; *Brice v. Hamilton*, 12 S. C. 32.

¹³ *Schoonover v. Osborne*, 117 Ia. 427; 90 N. W. 844; *Capen v. Alden*, 5 Met. (Mass.) 268; *Sawyer v. Tappan*, 14 N. H. 352.

municated intention to apply each payment to a specific item is without effect.¹⁴

§1403. When debtor can make appropriation.

The debtor's right to make application of the payment is lost if he makes the payment without directing the application,¹ or at any rate if the creditor makes application before the debtor does;² or if suit is brought before the debtor makes the application even if the creditor does not make any application;³ while it has been held that the debtor's right is lost absolutely upon making payment.⁴ If the debtor does not make the application when he makes the payment and the creditor then makes, the debtor's right is lost.⁵ If a vendee makes a payment to bind the bargain he can have it applied to the price of any goods which he accepts.⁶ Payment made in pursuance of a pre-existing contract as to its application is treated in law as being so applied,⁷ especially if the rights of third persons are prejudiced thereby, as where, in reliance upon an agreement to apply a payment to a debt secured by a deed of trust a third person has acquired a lien upon the property secured by such trust deed.⁸ Thus under a contract to pay rent by doing certain work no further application of such payment is necessary. The mere doing of such work operates as such payment.⁹

§1404. Appropriation by creditor.—Common Law rule.

When the debtor loses his right to make application of payments, the creditor acquires a right thereto. Upon the question

¹⁴ Schoonover v. Osborne, 117 Ia. 427; 90 N. W. 844.

¹ California Bank v. Webb, 94 N. Y. 467; Long v. Miller, 93 N. C. 233; Fargo First National Bank v. Roberts, 2 N. D. 195; 33 Am. St. Rep. 768; 49 N. W. 722.

² Dent v. Bank, 12 Ala. 275; Risher v. Risher, 194 Pa. St. 164; 45 Atl. 71.

³ Raymond v. Newman, 122 N. C. 52; 29 S. E. 353.

⁴ Moss v. Adams, 4 Ired. Eq. (N. C.) 42.

⁵ Field v. Holland, 6 Cr. (U. S.) 8.

⁶ Herzog v. Purdy, 119 Cal. 99; 51 Pac. 27.

⁷ Wyman v. Herard, 9 Okla. 35; 59 Pac. 1009.

⁸ Coney v. Laird, 153 Mo. 408; 77 Am. St. Rep. 721; 55 S. W. 96.

⁹ Stanley v. Turner, 68 Vt. 315; 35 Atl. 321.

of the extent of his right there is a conflict of authority. The Common Law rule as enforced in the majority of American states is that the creditor may apply the payments so as to protect his own interests, as long as he does not inflict positive injustice on the debtor;¹ as to the oldest claim,² so as to prevent it from being barred subsequently by the statute of limitations.³ He may apply payments thus made to an open account in preference to one evidenced by a note,⁴ to an unsecured debt in preference to one secured,⁵ such as a debt secured by a mortgage,⁶ or a lien,⁷ or by personal security,⁸ or to a debt insufficiently secured in preference to one fully secured,⁹ or to a debt against the debtor alone in preference to one secured by additional personal security.¹⁰ Thus a bank which holds A's note for a

¹ *Pearce v. Walker*, 103 Ala. 250; 15 So. 568; *Murdock v. Clarke*, 88 Cal. 384; 26 Pac. 601; *Wellman v. Miner*, 179 Ill. 326; 53 N. E. 609; *Keairnes v. Durst*, 110 Ia. 114; 81 N. W. 238; *Heaton v. Ainley*, 108 Ia. 112; 78 N. W. 798; superseding 74 N. W. 766; *First Presbyterian Church v. Santy*, 52 Kan. 462; 34 Pac. 974; *Wood v. Genett*, 120 Mich. 222; 79 N. W. 199; *Shelden v. Bennett*, 44 Mich. 634; 7 N. W. 223; *Cox v. Sloan*, 158 Mo. 411; 57 S. W. 1052; *Thorn, etc., Co. v. Bank*, 158 Mo. 272; 59 S. W. 109; *Lenzen v. Miller*, 53 Neb. 137; 73 N. W. 460; modifying on rehearing 51 Neb. 855; 71 N. W. 715; *Turner v. Hill*, 56 N. J. Eq. 293; 39 Atl. 137; *Burnett v. Sledge*, 129 N. C. 114; 39 S. E. 775; *Pelzer v. Steadman*, 22 S. C. 279; *Fargo v. Jennings*, 8 S. D. 99; 65 N. W. 433; *Jeffers v. Pease*, 74 Vt. 215; 52 Atl. 422; *Pope v. Ice Co.*, 91 Va. 79; 20 S. E. 940; *Kelso v. Russell*, 33 Wash. 474; 74 Pac. 561; *Buster v. Holland*, 27 W. Va. 510.

² *Lowenstein v. Meyer*, 114 Ga. 709; 40 S. E. 726; *Bourne v. Repass*, 2 Va. Dec. 694; 34 S. E. 623.

³ *Blair v. Carpenter*, 75 Mich. 167; 42 N. W. 790.

⁴ *Whittaker v. Groover*, 54 Ga. 174; *Bell v. Bell*, 20 S. C. 34; *Fargo v. Jennings*, 8 S. D. 99; 65 N. W. 433.

⁵ *M. A. Sweeney Co. v. Fry*, 151 Ind. 178; 51 N. E. 234; *Henry Bill Publishing Co. v. Utley*, 155 Mass. 366; 29 N. E. 635; *Kelso v. Russell*, 33 Wash. 474; 74 Pac. 561; *Northern National Bank v. Lewis*, 78 Wis. 475; 47 N. W. 834.

⁶ *Lewis v. Mfg. Co.*, 56 Conn. 25; 12 Atl. 637; *Bird v. Davis*, 14 N. J. Eq. 467; *Wadlinger v. Loan Association*, 153 Pa. St. 622; 26 Atl. 647; *Johnston v. Ins. Co.*, 107 Wis. 337; 83 N. W. 641.

⁷ *Bean v. Brown*, 54 N. H. 395; *North v. La Flesh*, 73 Wis. 520; 41 N. W. 633.

⁸ *People v. Powers*, 108 Mich. 339; 66 N. W. 215; *Coxe v. Milbrath*, 110 Wis. 499; 86 N. W. 174.

⁹ *Hanson v. Manley*, 72 Ia. 48; 33 N. W. 357.

¹⁰ *Plain v. Roth*, 107 Ill. 588; *Hanson v. Manley*, 72 Ia. 48; 33 N. W. 357; *Burks v. Albert*, 4 J. J. Mar. (Ky.) 97; 20 Am. Dec. 209;

debt which B has guaranteed may apply A's deposits to the payment of checks drawn by A.¹¹ The creditor may appropriate one payment among two or more debts.¹² The creditor may even apply payments to debts which for some technical reason are unenforceable, but are on valuable consideration and are not tainted with illegality. Thus he may apply a payment to a debt unenforceable because of non-compliance with the statute of frauds,¹³ or the stamp act,¹⁴ or a debt barred by the statute of limitations,¹⁵ or unenforceable because contracted when the debtor was an infant.¹⁶ The creditor cannot, however, make any application of such payment as will be unfair or unjust to the debtor. Thus he cannot apply the payment to a claim which is in dispute in preference to one whose correctness is conceded,¹⁷ or to a claim which has been paid before,¹⁸ or to an illegal claim instead of a legal one,¹⁹ even if such legal and illegal items are in one account,²⁰ as to an usurious contract in preference to a legal one.²¹ So the creditor cannot apply the payment to a debt which cannot have been contemplated

Wood v. Callaghan, 61 Mich. 402; 1 Am. St. Rep. 597; 28 N. W. 162; Harding v. Tift, 75 N. Y. 461; Fair Haven First National Bank v. Johnson, 65 Vt. 382; 26 Atl. 634.

¹¹ London, etc., Bank v. Parratt, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164.

¹² Beck v. Haas, 111 Mo. 264; 33 Am. St. Rep. 516; 20 S. W. 19; Young v. Alford, 118 N. C. 215; 23 S. E. 973. *Contra*, where such debts are barred by limitations, Ayer v. Hawkins, 19 Vt. 26.

¹³ Haynes v. Nice, 100 Mass. 327; 1 Am. Rep. 109.

¹⁴ Biggs v. Dwight, 1 M. & R. 308.

¹⁵ Williams v. Griffith, 5 M. & W. 300; Armistead v. Brooke, 18 Ark. 521; Ramsay v. Warner, 97 Mass. 8; 93 Am. Dec. 49; Pond v. Williams, 1 Gray (Mass.) 630; Moore v. Kiff, 78 Pa. St. 96; Hopper v.

Hopper, 61 S. C. 124; 39 S. E. 366.

¹⁶ Thurlow v. Gilmore, 40 Me. 378.

¹⁷ Perot v. Cooper, 17 Colo. 80; 31 Am. St. Rep. 258; 28 Pac. 391; Stones v. Talbot, 4 Wis. 442. This is sometimes explained on the theory that the debtor impliedly directs such application. Perot v. Cooper, 17 Colo. 80; 31 Am. St. Rep. 258; 28 Pac. 391.

¹⁸ Lyon v. Witters, 65 Vt. 396; 26 Atl. 588.

¹⁹ Rohan v. Hanson, 11 Cush. (Mass.) 44; Backman v. Wright, 27 Vt. 187; 65 Am. Dec. 187; Greene v. Tyler, 39 Pa. St. 368; Bancroft v. Dumas, 21 Vt. 456.

²⁰ Dunbar v. Garrity, 58 N. H. 575; Storer v. Haskell, 50 Vt. 341.

²¹ North Bend First National Bank v. Miltonberger, 33 Neb. 847; 51 N. W. 232; Adams v. Mahnken, 41 N. J. Eq. 332; 7 Atl. 435; Fay v. Lovejoy, 20 Wis. 403.

by the creditor, as to a debt not due when the payment was made,²² or to a debt incurred after such payment was made.²³

§1405. Civil Law rule.

In other states the Civil Law rule, that the creditor must apply payments so as to discharge that debt which it is most for the debtor's interest to have discharged, is followed.¹

§1406. When creditor can make appropriation.

As to the time at which the creditor may exercise his right of making application of payments there is a divergence of authority. The Common Law rule allows the creditor to make such application at any time before the controversy between debtor and creditor has arisen,¹ or as some authorities state the rule, at any time before the suit has been commenced.² Other authorities apply this rule even more liberally in favor of the creditor and allow him to make such application at any time before the court makes the application.³ The Civil Law rule, on the other hand, requires the creditor to make the application when payment is made, or, at least, as some authorities hold, within a reasonable time after payment has been made; and this rule is followed in some American states.⁴ Whatever rule is enforced, an application when once made is a finality,⁵ and

²² *Byrnes v. Claffey*, 69 Cal. 120; 10 Pac. 321; *Heintz v. Cahn*, 29 Ill. 308; *Bacon v. Brown*, 1 Bibb. (Ky.) 334; 4 Am. Dec. 640.

²³ *Niagara Bank v. Rosevelt*, 9 Cow. (N. Y.) 409; *Donally v. Wilson*, 5 Leigh (Va.) 329.

¹ *Sleet v. Sleet*, 109 La. 302; 33 So. 322; *Slaughter v. Milling*, 15 La. Ann. 526; *Dorsey v. Gassaway*, 2 H. & J. (Md.) 402; 3 Am. Dec. 557; *Neal v. Allisor*, 50 Miss. 175.

¹ *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Applegate v. Koons*, 74 Ind. 247; *Burt v. Botterworth*, 19 R. I. 127; 32 Atl. 167; *Norris v. Beaty*, 6 W. Va. 477.

² *Cory v. The Mecca* (1897), A. C. 286; *Haynes v. Waite*, 14 Cal. 446; *Richards v. Columbia*, 55 N. H. 96; *Moss v. Adams*, 4 Ired. Eq. (N. C.) 42.

³ *Pearce v. Walker*, 103 Ala. 250; 15. So. 568; *California Bank v. Webb*, 94 N. Y. 467; *Baum v. Trantham*, 42 S. C. 104; 46 Am. St. Rep. 697; 19 S. E. 973; *Heilbron v. Bisell*, Bailey Eq. (S. C.) 430.

⁴ *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Harker v. Conrad*, 12 S. & R. (Pa.) 301; 14 Am. Dec. 691.

⁵ *Harly v. Potts*, 52 W. Va. 263; 43 S. E. 218.

can be changed afterwards only by the consent of the parties. Thus A was indebted to B on a note and subsequently they had open mutual accounts, A furnishing produce which B sold. B applied the price of such produce to the open account. After B's death his administrator was not allowed to change the application of such payments to the note, leaving the open account barred by the statute of limitations.⁶ However a credit on a specific note, without the knowledge of the debtor has been held not to be an irrevocable application.⁷

§1407. Appropriation by law.—Presumed mutual intention of parties followed.

If no affirmative intention to make an application appears, the court will apply such payments as justice dictates and as the parties would probably have intended.¹ So vague a rule is of little practical aid.² Certain concrete rules have, however, been worked out and are followed by the courts with substantial unanimity. Payment will in the absence of reasons to the contrary be applied to the oldest debt,³ as to the note of a series

⁶ Hanly v. Potts, 52 W. Va. 263; 43 S. E. 218.

⁷ Law v. Blomberg (Neb.), 91 N. W. 206.

¹ Price v. Dowdy, 34 Ark. 285; London, etc., Bank v. Parrott, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164; Murdock v. Clarke, 88 Cal. 384; 26 Pac. 601; Chester v. Wheelwright, 15 Conn. 562; Andrews v. Bank, 108 Ga. 802; 34 S. E. 183; Koch v. Roth, 150 Ill. 212; 37 N. E. 317; Jacobs v. Ballenger, 130 Ind. 231; 15 L. R. A. 169; 29 N. E. 782; First National Bank v. Hollinsworth, 78 Ia. 575; 6 L. R. A. 92; 43 N. W. 536; Hillyer v. Vaughan, 1 J. J. Mar. (Ky.) 583; Richardson v. Woodbury, 12 Cush. (Mass.) 279; Grasser, etc., Co. v. Rogers, 112 Mich. 112; 67 Am. St. Rep. 389; 70 N. W. 445; Thorne v. Allen, 72 Minn. 461; 75 N. W. 706; Doherty

v. Cotter, 68 N. H. 37; 38 Atl. 399; White v. Trumbull, 15 N. J. L. 314; 29 Am. Dec. 687; Raymond v. Newman, 122 N. C. 52; 29 S. E. 353; Trullinger v. Kofoed, 7 Or. 228; 33 Am. Rep. 708; Risher v. Risher, 194 Pa. St. 164; 45 Atl. 71; White v. Blakemore, 8 Lea (Tenn.) 49; Phillips v. Herndon, 78 Tex. 378; 22 Am. St. Rep. 59; 14 S. W. 857; Pawlet v. Kelley, 69 Vt. 398; 38 Atl. 92; Frazer v. Miller, 7 Wash. 521; 35 Pac. 427.

² See criticism in Hersey v. Bennett, 28 Minn. 86; 41 Am. Rep. 271; 9 N. W. 590.

³ Rickerson Roller Mill Co. v. Machine Co., 75 Fed. 554; 23 C. C. A. 302; Golden v. Conner, 89 Ala. 598; 8 So. 184; Goldsmith v. Lewine, 70 Ark. 516; 69 S. W. 308; Dunnington v. Kirk, 57 Ark. 595; 22 S. W. 430; Moss v. Odell, 141 Cal. 335; 74 Pac.

which matures earliest,⁴ and to the earliest items of a running account.⁵ A change in methods of bookkeeping from the "old system" to the "coupon book" system while an account is running does not interrupt the account so as to prevent a payment made after the change from applying to items entered before the change.⁶ A change in the membership of the creditor firm does not change the account for purposes of appropriation; and if no appropriation is made by either party the law will apply a general payment to the earliest unpaid item of the original account.⁷ The rule that payment should be applied to the oldest debt has been applied in cases where some of the items of an account could be secured by lien and others could not.⁸

999; *Lodge v. Ainscow*, 1 Penne. (Del.) 327; 41 Atl. 187; *Green v. Ford*, 79 Ga. 130; 3 S. E. 624; *Clark v. Huey*, 12 Ind. App. 224; 40 N. E. 152; *Briggs v. Loan Association*, 114 Ia. 232; 86 N. W. 320; *Sleet v. Sleet*, 109 La. 302; 33 So. 322; *Bloom v. Kern*, 30 La. Ann. 1263; *Grasser, etc., Co. v. Rogers*, 112 Mich. 112; 67 Am. St. Rep. 389; 70 N. W. 445; *Jefferson v. Church*, 41 Minn. 392; 34 N. W. 74; *Shelby v. Brown (Miss.)*, 24 So. 531; *Beck v. Haas*, 111 Mo. 264; 33 Am. St. Rep. 516; 20 S. W. 19; *Doherty v. Cotter*, 68 N. H. 37; 38 Atl. 499; *Parks v. Ingram*, 22 N. H. 283; 55 Am. Dec. 153; *Miller v. Womble*, 122 N. C. 135; 29 S. E. 102; *Risher v. Risher*, 194 Pa. St. 164; 45 Atl. 71; *Frazer v. Miller*, 7 Wash. 521; 35 Pac. 427; *Rowan v. Chenoweth*, — W. Va. —; 47 S. E. 80; *Zinns Mfg. Co. v. Mendelson*, 89 Wis. 133; 61 N. W. 302.

⁴ *In re Stevens*, 107 Fed. 243; *Gemin v. Ingersoll*, 11 W. Va. 549.

⁵ *Clayton's Case*, 1 Meriv. 572; *Jones v. United States*, 7 How. (U. S.) 681; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Golden v. Conner*, 89 Ala. 598; 8 So. 148;

Sprague v. Hazenwinkle, 53 Ill. 419; *Allen v. Brown*, 39 Ia. 336; *Sternberger v. Gowdy*, 93 Ky. 146; 19 S. W. 186; *Helm v. Commonwealth*, 79 Ky. 67; *Sleet v. Sleet*, 109 La. 302; 33 So. 322; *People v. Sheehan*, 118 Mich. 539; 77 N. W. 88; *Winnebago Paper Mills v. Travis*, 56 Minn. 480; 58 N. W. 36; *National Park Bank v. Bank*, 114 N. Y. 28; 11 Am. St. Rep. 612; 20 N. E. 632; *Jenkins v. Smith*, 72 N. C. 296; *Patterson v. Bank*, 26 Or. 509; 38 Pac. 817; *Pardee v. Markle*, 111 Pa. St. 548; 56 Am. Rep. 299; 5 Atl. 36; *Lippman v. Boals*, 16 Lea (Tenn.) 283; *Willis v. McIntyre*, 70 Tex. 34; 8 Am. St. Rep. 574; 7 S. W. 594; *Smith v. Loyd*, 11 Leigh (Va.) 535; 37 Am. Dec. 621; *Hannan v. Engelmann*, 49 Wis. 278; 5 N. W. 791.

⁶ *Goldsmith v. Lewine*, 70 Ark. 516; 69 S. W. 308.

⁷ *Devaynes v. Noble*, 1 Meriv. 529; *Schoonover v. Osborne*, 108 Ia. 453; 79 N. W. 263; *Forst v. Kirkpatrick*, 64 N. J. Eq. 578; 54 Atl. 554; *Morgan v. Tarbell*, 28 Vt. 498.

⁸ *Pond, etc., Co. v. O'Connor*, 70 Minn. 266; 73 N. W. 159; modification denied, 73 N. W. 248.

This rule will not be applied where it will work injustice. The law will not apply a general payment to the interest on a mortgage debt so as to prevent the mortgagee from exercising an option to declare the entire amount due.⁹ It has been held that the law will not apply a payment to a debt barred by the statute of limitations,¹⁰ though there is authority to the effect that the law may appropriate a general payment to a debt barred by the statute of limitations.¹¹ A payment upon an interest-bearing debt will be applied to the interest in preference to the principal,¹² and if the debtor is indebted to the creditor in several debts, each bearing interest, payment should be applied to interest on all the debts before it is applied to the principal of any one debt.¹³ Even if the payment is equal in amount to the principal, it must be applied first to discharge overdue interest.¹⁴ Where the law allows interest on interest, a payment should be applied first to discharge overdue interest on interest; second, to discharge overdue interest, and third, to discharge the principal.¹⁵ The law will apply a payment to an undisputed claim in preference to a disputed one,¹⁶ and to an overdue claim in preference to one incurred after such payment,¹⁷ and to the valid part of a debt in preference to the void

⁹ *Peterson v. Johnson*, 20 Wash. 497; 55 Pac. 932.

¹⁰ *Estes v. Fry*, 166 Mo. 70; 65 S. W. 741; *Livermore v. Rand*, 26 N. H. 85.

¹¹ *Fletcher v. Gillan*, 62 Miss. 8; *Phipps v. Willis*, 11 Tex. Civ. App. 186; 32 S. W. 801.

¹² *Story v. Livingston*, 13 Pet. (U. S.) 359; *London, etc., Bank v. Parrott*, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164; *Jacobs v. Ballenger*, 130 Ind. 231; 15 L. R. A. 169; 29 N. E. 782; *Carter v. Sanderson* (Ky.), 41 S. W. 306; *Fay v. Bradley*, 1 Pick. (Mass.) 194; *Wallace v. Glaser*, 82 Mich. 190; 21 Am. St. Rep. 556; 46 N. W. 227; *Bay View Land Co. v. Myers*, 62 Minn. 265; 64 N. W. 816; *Anderson v. Perkins*, 10 Mont. 154; 25 Pac. 92; *Johnson v.*

Johnson, 5 Jones Eq. (N. C.) 167; *Miami Exporting Co. v. Bank*, 5 Ohio 260; *Spires v. Hamot*, 8 W. & S. (Pa.) 17; *Bogges v. Goff*, 47 W. Va. 139; 34 S. E. 741.

¹³ *Steele v. Taylor*, 4 Dana (Ky.) 445; *Genin v. Ingersoll*, 11 W. Va. 549.

¹⁴ *Henderson Cotton Mfg. Co. v. Machine Shops*, 86 Ky. 668; 7 S. W. 142; *People v. New York County*, 5 Cow. (N. Y.) 331.

¹⁵ *Anketel v. Converse*, 17 O. S. 11; 91 Am. Dec. 115.

¹⁶ *The Peerless*, 80 Fed. 942.

¹⁷ *United States v. Morgan*, 111 Fed. 474; *McWhorter v. Blumenthal*, 136 Ala. 568; 96 Am. St. Rep. 43; 33 So. 552; *London, etc., Bank v. Parrott*, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164.

part.¹⁸ Payment to a building and loan association by a borrowing member is to be applied to his liability for the stock and not upon his loan.¹⁹

§1408. Appropriation by law.—Common Law rule.

When the interests of the debtor require one application and those of the creditor require another, we have again a conflict between the Common Law rule and the Civil Law rule.¹ The Common Law rule requires the law to apply payments for the benefit of the creditor in accordance with his presumed intention, where this can be done without injustice to the debtor.² Where this rule is followed a payment will be applied to an unsecured debt in preference to one which is secured,³ and to the debt secured by the more precarious and less valuable of different securities.⁴ Thus a general payment will be applied

¹⁸ *Kuker v. McIntyre*, 43 S. C. 117; 20 S. E. 976.

¹⁹ *Sheldon v. Loan Association*, 121 Ala. 278; 25 So. 820.

¹ "The difference between the Common Law and the Roman Law is to be found in the application which the law makes in the appropriation of a payment in the absence of any made by either the debtor or the creditor. The Common Law appropriates the payment most beneficially for the creditor; the civil law appropriates the payment most beneficially for the debtor." *McLaughlin v. Green*, 48 Miss. 175, 205.

² *Poling v. Flanagan*, 41 W. Va. 191; 23 S. E. 685.

³ *Sanborn v. Stark*, 31 Fed. 18; *Stickney v. Moore*, 108 Ala. 590; 19 So. 76; *Offutt v. Devine's Ex'r* (Ky.), 55 S. W. 428; 53 S. W. 816; *Bell, etc., Co. v. Glass Works Co.*, 106 Ky. 7; 50 S. W. 2, 1092; 51 S. W. 180; reversing on rehearing 48 S. W. 440; *Wood v. Calla-*

ghan, 61 Mich. 402; 1 Am. St. Rep. 597; 28 N. W. 162; *Lester v. Houston*, 101 N. C. 605; 8 S. E. 366; *First National Bank v. Johnson*, 65 Vt. 382; 26 Atl. 634; *Still v. Buzzell*, 60 Vt. 478; 12 Atl. 209; *Publishing Co. v. Harris*, 11 Wash. 500; 39 Pac. 965; *North v. La Flesh*, 73 Wis. 520; 41 N. W. 633.

⁴ *McCurdy v. Middleton*, 82 Ala. 131; 2 So. 721; *California, etc., Bank v. Ginty*, 108 Cal. 148; 41 Pac. 38; *Hanson v. Manley*, 72 Ia. 48; 33 N. W. 357; *Blanton v. Rice*, 5 T. B. Mon. (Ky.) 253; *Turner v. Hill*, 56 N. J. Eq. 293; 39 Atl. 137; *Leeds v. Gifford*, 41 N. J. Eq. 464; 5 Atl. 795; *Ramsour v. Thomas*, 32 N. C. 165; *Richard's Estate*, 185 Pa. St. 155; 39 Atl. 1117; *Pardee v. Markle*, 111 Pa. St. 548; 56 Am. Rep. 299; 5 Atl. 36; *Pope v. Ice Co.*, 91 Va. 79; 20 S. E. 940; *Smythe v. Trust Co.*, 12 Wash. 424; 41 Pac. 184; *Poling v. Flanagan*, 41 W. Va. 191; 23 S. E. 685.

to an unsecured debt in preference to one secured by mortgage,⁵ or by a laborer's lien,⁶ or a vendor's lien,⁷ or by collateral personal security,⁸ and to a debt inferior to homestead rights in preference to one superior to them.⁹ Some states that hold that a general payment will be appropriated to an unsecured debt in preference to one which is secured, recognize an exception in case of debts secured by personal security only. It is held that a surety may insist on the appropriation of payments to debts in order of maturity irrespective of the security afforded by his liability thereon.¹⁰

§1409. Civil Law rule.

The Civil Law rule requires the law to apply payments for the benefit of the debtor in accordance with his presumed intention.¹ Where this rule is followed, the law applies a payment to the debt which is most burdensome to the debtor.² Thus payment will be applied to a secured debt,³ as one secured by

⁵ *The Katie O'Neil*, 65 Fed. 111; *Jeffers v. Pease*, 74 Vt. 215; 52 Atl. 422.

⁶ *Wagner's Appeal*, 103 Pa. St. 185; 49 Am. Rep. 121.

⁷ *McCauley v. Holtz*, 62 Ind. 205.

⁸ *Sanborn v. Stark*, 31 Fed. 18; *White v. Beem*, 80 Ind. 239; *Burks v. Albert*, 4 J. J. Mar. (Ky.) 97; 20 Am. Dec. 209; *Burt v. Butterworth*, 19 R. I. 127; 32 Atl. 167.

⁹ *Andrews v. Loan Association* (Ky.), 70 S. W. 409. A different result was reached on similar facts in *First National Bank v. Hollingsworth*, 78 Ia. 575; 6 L. R. A. 92; 43 N. W. 536, on the theory that the superiority of a debt to homestead rights was not a lien, that the rights of the debtor's family should be protected; and that the law tended to favor homestead rights.

¹⁰ *Pardee v. Markle*, 111 Pa. St.

548; 56 Am. Rep. 299; 5 Atl. 36; *Berghaus v. Alter*, 9 Watts (Pa.) 386; *Blackmore v. Granbery*, 98 Tenn. 277; 39 S. W. 229.

¹ "The doctrine of the civil law upon this subject has been adopted in this state." *McLaughlin v. Green*, 48 Miss. 175, 205; *Hamer v. Kirkwood*, 25 Miss. 95; *Poindexter v. La Roche*, 7 S. & M. (Miss.) 699.

² *Scott v. Fisher*, 4 T. B. Mon. (Ky.) 387; *Clark v. Boarman*, 89 Md. 428; 43 Atl. 926; *Harker v. Conrad*, 12 S. & R. (Pa.) 301; 14 Am. Dec. 691; *Roakes v. Bailey*, 55 Vt. 542.

³ *Gillard v. Huval*, 22 La. Ann. 426; *Clark v. Boarman*, 89 Md. 428; 43 Atl. 926; *Blackmore v. Granbery*, 98 Tenn. 277; 39 S. W. 229; *Bussey v. Gant*, 10 Humph. (Tenn.) 238; *Robinson v. Doolittle*, 12 Vt. 246.

mortgage,⁴ or chattel mortgage.⁵ So payment will be applied to a debt which bears interest in preference to one which does not,⁶ and to one bearing a higher rate of interest in preference to one bearing a lower rate.⁷ If a trustee who is individually indebted to a beneficiary makes payments to him in excess of the income arising from the trust-fund, it will be presumed that the excess is to be applied to the individual debts.⁸ Even where payments are to be applied in the manner most beneficial to the debtor, payments must be applied to interest first.⁹

§1410. Interest of third persons in fund used for payment.

Other questions may arise where third persons are interested in one of two funds, either as principal or surety. In such cases the rights of third persons may override even the right of the debtor and creditor to apply a payment by mutual agreement or to change an application once made. Thus if A has given bond as a public officer with one set of sureties for one period of time, and with a different set of sureties for a subsequent period of time, money received and paid in by A during the second period cannot be applied to an indebtedness incurred by him during the first period, since the effect would be to transfer the burden from the sureties during the period in which he had become indebted to the sureties during the period in which he discharged his obligations punctually.¹ Not even the specific agreement of the debtor and creditor can operate

⁴ *Frazier v. Janahan*, 71 Md. 131; 17 Am. St. Rep. 516; *Neal v. Allison*, 50 Miss. 175. In the language of the Louisiana courts, payment will be imputed to the debt bearing mortgage. *New Orleans Ins. Co. v. Tio*, 15 La. Ann. 174; citing *Forstall v. Blanchard*, 12 La. 6; *Dunlap v. Tarkington*, 5 La. Ann. 569.

⁵ *Windsor v. Kennedy*, 52 Miss. 164

⁶ *Scott v. Fisher*, 4 T. B. Mon.

⁷ (Ky.) 387; *Bussey v. Gant*, 10 Humph. (Tenn.) 238.

⁸ *Massachusetts v. Telegraph Co.*, 141 U. S. 40; *Magarity v. Shipman*, 82 Va. 784.

⁹ *Calvert v. Carter*, 18 Md. 73.

¹ *Johnston v. Succession of Robins*, 20 La. Ann. 569; 96 Am. Dec. 426.

² *Jones v. United States*, 7 How. (U. S.) 681 (obiter); *United States v. Eckford*, 1 How. (U. S.) 250; *United States v. January*, 7 Cranch (U. S.) 572.

to apply money collected during the second period to the payment of a deficiency created during the first period.² However, in the absence of a showing that the fund paid in was collected during the second period, it will be assumed that the payment is made from the private funds of the official.³ If a debtor has the specific fund for which another is surety he cannot even with the consent of the creditor apply it to a different debt.⁴ Thus if a surety is bound under an agreement that the loan thus made shall be used in paying for stored wheat, he is not liable to those having notice, if the fund is diverted from this purpose.⁵ If payment is made by a third person who is liable as indorser for the debtor on one of several notes held by the creditor, the creditor cannot apply such payment to such other notes.⁶ So the debtor and creditor cannot change the application of a payment to a debt secured by a lien so as to prejudice other lienholders,⁷ or a subsequent purchaser of mortgaged premises who buys after the original application of such payment to the mortgage debt.⁸

§1411. Appropriation when immaterial.

In the absence of facts differentiating debts, it has been held that the law will apply payments pro rata.¹ If no practical difference exists in legal effect between an appropriation made without legal authority and one made in accordance with law, the law will not interfere to change the appropriation as made. Thus if two notes are secured by a mortgage, application by the creditor of a payment to the last to fall due instead of to the first is not prejudicial to the debtor, where, even if such pay-

² United States v. January, 7 Cranch (U. S.) 572.

³ Pratt's Appeal, 41 Conn. 191; Helm v. Commonwealth, 79 Ky. 67.

⁴ Colerain v. Bell, 9 Met. (Mass.) 499; Merchants' Ins. Co. v. Herber, 68 Minn. 420; 71 N. W. 624; (criticising, Pine County v. Willard, 39 Minn. 125; 12 Am. St. Rep. 622; 1 L. R. A. 118; 39 N. W. 71).

⁵ Crossley v. Stanley, 112 Ia. 24;

84 Am. St. Rep. 321; 83 N. W. 806.

⁶ Memphis City Bank v. Smith, 102 Tenn. 467; 52 S. W. 149.

⁷ Green Bay Lumber Co. v. Thomas, 106 Ia. 420; 76 N. W. 749.

⁸ McCown v. Westbury, 52 S. C. 421; 29 S. E. 663; rehearing denied, 30 S. E. 142.

¹ Turner v. Hill, 56 N. J. Eq. 293; 39 Atl. 137.

ment had been applied to the first note, a balance would be due thereon, which, by the terms of the mortgage would make the second note due and payable at the option of the mortgagee.² If the debtor owes two notes of equal amounts to the same payee, secured in the same way and indorsed to two different holders, and he directs a payment due to him from the indorser to be applied on one of such notes, the application of such payment to the other note is in no way prejudicial to the debtor and is binding.³

§1412. Involuntary payments.

The general rules as to the application of payments have no effect in case of involuntary payments, coerced by the law. Neither debtor¹ nor creditor² can direct the application of involuntary payments compelled by legal process. Even if a mortgage is given voluntarily, payment as the result of a foreclosure suit is not voluntary, and the debtor cannot direct the payment.³ Involuntary payments have, in some jurisdictions, been applied to unsecured rather than to secured indebtedness.⁴ Under some circumstances the opposite rule has been applied. A payment by an assignee in insolvency will be applied to a debt secured by a mortgage in preference to one not so secured, since the assignee represents the creditors as well as the debtor.⁵ Another rule sometimes followed in such cases is to prorate the payment among the several debts, irrespective of the collateral

² Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2; modified in banc, 51 Pac. 542.

³ Forbes v. Morehead (Ky.), 58 S. W. 982.

¹ Orleans County National Bank v. Moore, 112 N. Y. 543; 8 Am. St. Rep. 775; 3 L. R. A. 302; 20 N. E. 357.

² Blackstone Bank v. Hill, 10 Pick. (Mass.) 129; Cage v. Iler, 13 Miss. 410; 43 Am. Dec. 521.

³ Orleans County National Bank v. Moore, 112 N. Y. 543; 8 Am. St.

Rep. 775; 3 L. R. A. 302; 20 N. E. 357.

⁴ California National Bank v. Ginty, 108 Cal. 148; 41 Pac. 38; Smith v. Moore, 112 Ia. 60; 83 N. W. 813; Citizens' Bank v. Whinery, 110 Ia. 390; 81 N. W. 694; Hanson v. Manley, 72 Ia. 48; 33 N. W. 357; Small v. Older, 57 Ia. 326; 10 N. W. 734; Wilson v. Allen, 11 Or. 154; 2 Pac. 91.

⁵ Bell, etc., Co. v. Glass Works Co., 106 Ky. 7; 50 S. W. 1092; 51 S. W. 180; reversing on rehearing, 48 S. W. 440.

security held for each.⁶ Special questions may arise where a particular fund has been appropriated by the debtor in advance to the payment of a specific debt. Thus a debtor may give to his creditor a mortgage or lien on specific property. Since the law is often invoked to sell such property, the question of appropriation in advance is often complicated with questions of involuntary payments. The proceeds of property encumbered by a lien,⁷ or mortgage,⁸ should be applied to the payment of the debt secured thereby. Money paid to a mortgagee on account of loss of property secured by a chattel mortgage must be applied by him to the mortgage debt.⁹ A partnership borrowed money of A, secured in part by a first mortgage, in part by a second mortgage on improved realty and in part not secured; and insurance policies covering such realty were indorsed to A as collateral security. The building was destroyed by fire; and the insurance money was paid to A who credited it so as to discharge the debt secured by the first mortgage and the balance upon unsecured debts. It was held that as against the heirs of a deceased partner, A must credit the balance upon the debt secured by the second mortgage.¹⁰ In some cases where the same security covers several debts the creditor has a right to make application among such debts. Mortgagees in possession claiming under several mortgages may apply the rents and profits to the different mortgage debts as they please.¹¹ So in case of foreclosure of a mortgage securing several debts, it was held that the mortgagee could apply the proceeds to such of said debts as were not otherwise secured.¹² So if personal

⁶ *Cohen v. L'Engle*, 29 Fla. 655; *sub nomine Cohen v. Bank*, 11 So. 44; *Browning v. Carson*, 163 Mass. 255; 39 N. E. 1037; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; 35 Am. Dec. 322; *Shelden v. Bennett*, 44 Mich. 634; 7 N. W. 223.

⁷ *Clements v. Draper*, 108 Ala. 211; 19 So. 25; *Strickland v. Hardie*, 82 Ala. 412; 3 So. 40.

⁸ *Armstrong v. McLean*, 153 N. Y. 490; 47 N. E. 912; *Summer v. Kelly*, 38 S. C. 507; 17 S. E. 364.

⁹ *Sherman v. Foster*, 158 N. Y. 587; 53 N. E. 504. (A third person was surety for the mortgage debt.)

¹⁰ *Burbank v. Buhler*, 108 La. 39; 32 So. 201. (Under the civil law rule in force in this state probably any general payment should have been so applied.)

¹¹ *Leach v. Curtin*, 123 N. C. 85; 31 S. E. 296.

¹² *Smith v. Moore*, 112 Ia. 60; 83 N. W. 813.

property is pledged to secure certain debts, some of which are not otherwise secured and others of which are secured also by personal security, the creditor may apply the proceeds of such pledge to the debts otherwise unsecured.¹³ According to some authorities the law will apply the proceeds of mortgaged realty pro rata among the different debts secured thereby, irrespective of the order of their maturity¹⁴ or assignment.¹⁵ Other authorities apply the proceeds to the debts in order of their maturity.

¹³ Wilcox v. Bank, 7 All. (Mass.) 270.

¹⁵ Maddox v. Teague, 18 Mont. 593; 47 Pac. 209.

¹⁴ Maddox v. Teague, 18 Mont. 593; 47 Pac. 209.

CHAPTER LXIX.

TENDER.

§1413. Nature of tender.

Tender is a proffer of performance. When tender is made the creditor has a reasonable time in which to decide whether he will accept it or not,¹ unless he rejects the tender without taking such reasonable time. If the party to whom tender is made accepts it in full performance, he is ordinarily bound by such acceptance, and cannot subsequently claim that full performance has not been made.² Thus if a certain sum is paid into court at the beginning of a suit as full tender, the creditor cannot accept it and continue the suit for the rest of his cause of action, even if he protests that more is due when he accepts the money.³ If the party to whom performance is tendered refuses to accept it, the question is then presented whether the tender has been made in proper form, whether the creditor has waived any of his rights to insist on a proper tender, and what are the rights of the parties thereunder.

§1414. Elements of tender.— Who can make tender.

If the creditor stands upon his rights and waives none of them he may insist upon the debtor's strict compliance with the elements of tender. Only the debtor, or his legal representative,¹ can make a valid tender. The creditor may refuse a tender by a stranger, without incurring any legal liability,²

¹ *Root v. Bradley*, 49 Mich. 27; 12 N. W. 896; *Moore v. Norman*, 43 Minn. 428; 19 Am. St. Rep. 247; 9 L. R. A. 55; 45 N. W. 857.

² *Jonathan Turner's Sons v. Machine Co.*, 98 Tenn. 604; 38 L. R. A. 549; 41 S. W. 57.

³ *Jonathan Turner's Sons v. Machine Co.*, 98 Tenn. 604; 38 L. R. A. 549; 41 S. W. 57.

¹ *McDougald v. Dougherty*, 11 Ga. 570; *Sharp v. Garesche*, 90 Mo. App. 233.

² *Gibson v. Lyon*, 115 U. S. 439;

though if he accepts such payment or performance he is concluded thereby. An exception to this rule exists in cases where a person financially interested in the discharge of a debt,³ such as a surety⁴ or the owner of realty upon which such debt is a lien,⁵ as the owner of mortgaged premises,⁶ tenders payment of such debt. Such tender is valid.

§1415. To whom tender can be made.

Tender can be made only to the creditor,¹ or to one of two or more joint creditors,² his duly authorized agent,³ or his personal representatives. Tender of a debt due to a building and loan association made to the local secretary is sufficient.⁴ So a tender may be made to the attorney at law in whose hands the claim has been placed for collection.⁵ So a tender made after a bona fide attempt to find the creditor, to the creditor's son who is authorized to reject the tender unless a receipt in full of all demands is also given by the debtor, is sufficient.⁶ If tender is made to a stranger it is without legal effect. So a tender to an agent not authorized to receive payment is without legal effect.⁷ So is a tender made to executors named in a will not yet probated.⁸

§1416. What can be tendered.

If the contract calls for a payment in money, tender must be made in such money as is legal tender. Coin which is legal

Mahler v. Newbaur, 32 Cal. 168; 91 Am. Dec. 571; Sinclair v. Learned, 51 Mich. 335; 16 N. W. 672.

³ Kincaid v. School District, 11 Me. 188.

⁴ Hampshire Mfg. Bank v. Billings, 17 Pick. (Mass.) 87.

⁵ Noyes v. Wyckoff, 114 N. Y. 204; 21 N. E. 158.

⁶ Neldon v. Roof, 55 N. J. Eq. 608; 38 Atl. 429.

⁷ King v. Finch, 60 Ind. 420; Fletcher v. Daugherty, 13 Neb. 224; 13 N. W. 206.

⁸ Flanigan v. Seelye, 53 Minn.

23; 55 N. W. 115; Carman v. Pultz, 21 N. Y. 547; Dawson v. Ewing, 16 S. & R. (Pa.) 371.

³ Hoyt v. Byrnes, 11 Me. 475; McIniffe v. Wheelock, 1 Gray (Mass.) 600.

⁴ Smith v. Loan Association, 119 N. C. 257; 26 S. E. 40.

⁵ Salter v. Shove, 60 Minn. 483; 62 N. W. 1126.

⁶ Crawford v. Osmun, 94 Mich. 533; 54 N. W. 284.

⁷ Chipman v. Bates, 5 Vt. 143.

⁸ Hyde v. Heller, 10 Wash. 586; 39 Pac. 249.

tender is not deprived of that quality by being worn as long as it retains the appearance of a coin issued from the mint.¹ Tender in bank notes,² or by check,³ or a certified check,⁴ or a certificate of deposit,⁵ or by a "time check" tendered to an employe,⁶ or chattels,⁷ is insufficient tender of a debt payable in money if objection is made upon that ground. So if a debt is due to the state, tender cannot be made in state warrants which have no connection with the debt.⁸ It has been held that a bank must accept its own notes as payment, and hence that such a tender is good.⁹ A tender of the same kind of money as that borrowed, and the only kind in general circulation in that community, has been held sufficient.¹⁰ If the property tendered is not homogeneous, the exact property to be tendered must be selected by the debtor, and if he tenders a greater amount, leaving the creditor to make the selection required by the contract,¹¹ the tender is insufficient. If the property is homogeneous, such as nuts¹² or grain,¹³ tender of a larger

¹ Mobile St. Ry. v. Watters, 135 Ala. 227; 33 So. 42; Jersey City, etc., R. R. v. Morgan, 52 N. J. L. 60; 18 Atl. 904. And see for a more extreme case holding worn coin legal tender, Ruth v. Transit Co., 98 Mo. App. 1; 71 S. W. 1055.

² Grigby v. Oakes, 2 B. & P. 526; Hallowell, etc., Bank v. Howard, 13 Mass. 235; Donaldson v. Benton, 4 Div. & B. (N. C.) 435.

³ Larsen v. Breene, 12 Colo. 480; 21 Pac. 498; Harding v. Loan Co., 84 Ill. 251; Collier v. White, 67 Miss. 133; 6 So. 618; Te Poel v. Shutt, 57 Neb. 592; 78 N. W. 288; Cady v. Case, 11 Wash. 124; 39 Pac. 375; Lewis v. Larson, 45 Wis. 353.

⁴ Thorne v. San Francisco, 4 Cal. 127; Larsen v. Breene, 12 Colo. 480; Barbour v. Hickey, 2 App. D. C. 207; 24 L. R. A. 763.

⁵ Dougherty v. Hughes, 3 Greene (Ia.) 92.

⁶ Burlington, etc., Department v.

White, 41 Neb. 547; 43 Am. St. Rep. 701; 59 N. W. 747, 751.

⁷ Wilson v. McVey, 83 Ind. 108.

⁸ People v. Miles, 56 Cal. 401; Kentucky Chair Co. v. Commonwealth, 105 Ky. 455; 49 S. W. 197; Raymond v. State, 54 Miss. 563; 28 Am. Rep. 382; Battle v. Thompson, 65 N. C. 406.

⁹ Northampton Bank v. Balliet, 8 W. & S. (Pa.) 311; 42 Am. Dec. 297. *Contra*, as to payment. Hallowell, etc., Bank v. Howard, 13 Mass. 235; Cox v. Bank, 8 N. J. L. 172; 14 Am. Dec. 417.

¹⁰ King v. King, 90 Va. 177; 17 S. E. 894.

¹¹ Clark v. Baker, 11 Met. (Mass.) 186; 45 Am. Dec. 199; Croninger v. Crocker, 62 N. Y. 151.

¹² Brownfield v. Johnson, 128 Pa. St. 254; 6 L. R. A. 48; 18 Atl. 543.

¹³ Armstrong v. Tait, 8 Ala. 635; 42 Am. Dec. 656; Hughes v. Prewitt, 5 Tex. 264.

amount than that provided for by contract, leaving the creditor to select the quantity specified, is sufficient. But cattle have been held not to be homogeneous within the meaning of this rule.¹⁴ In many cases even of homogeneous property,¹⁵ such as scrap iron,¹⁶ it has been held to be the duty of the debtor to separate the property to be tendered from the general mass.

§1417. Actual production of money.

The money must be actually produced and offered to the creditor unless this requirement is waived.¹ What amounts to waiver is discussed elsewhere.² Some statutes make a written offer to pay money equivalent to tender if not accepted. Such statutes have no application to cases where the party making the tender has neither the intent nor the ability to perform.³ Production of money is not always conclusive tender. Thus the debtor produced money and laid it on the table before the creditor without counting it before him or letting him count it, and asked an extension for another year, which was granted. This was not a sufficient tender.⁴

§1418. Tender of less amount than due.

The amount tendered must be equal to the amount of the indebtedness. Tender of less than the amount due is ineffective.¹ So if tender is made after interest has begun to run, it

¹⁴ *Bates v. Bates*, Walk. (Miss.) 401; 12 Am. Dec. 572.

¹⁵ *Dixon v. Fletcher*, 3 M. & W. 146; *Rommel v. Wingate*, 103 Mass. 327; *Croniger v. Crocker*, 62 N. Y. 151.

¹⁶ *Perry v. Iron Co.*, 16 R. I. 318; 15 Atl. 87.

¹ *Angier v. Loan Association*, 109 Ga. 625; 35 S. E. 64; *Deering Harvesting Co. v. Hamilton*, 80 Minn. 162; 83 N. W. 44; *Pinney v. Jorgenson*, 27 Minn. 26; 6 N. W. 376; *North v. Mallett*, 2 Hayw. (N. C.) 151; 2 Am. Dec. 622.

² See § 1425.

³ *McCourt v. Johns*, 33 Or. 561; 53 Pac. 601.

⁴ *McInerney v. Lindsay*, 97 Mich. 238; 56 N. W. 603.

¹ *Lilienthal v. McCormick*, 117 Fed. 89; 54 C. C. A. 475; *McCalley v. Otey*, 103 Ala. 469; 15 So. 945; *Colton v. Bank*, 137 Cal. 376; 70 Pac. 225; *Welch v. Adams*, 152 Mass. 74; 9 L. R. A. 244; 25 N. E. 34; *Montague v. Lougan*, 68 Mich. 98; 35 N. W. 840; *Spoon v. Frambach*, 83 Minn. 301; 86 N. W. 106; *Moore v. Norman*, 43 Minn. 428; 19 Am. St. Rep. 247; 9 L. R. A. 55; 45 N. W. 857; *Rand v. Harris*, 83

must include interest,² and tender made after an action has been instituted must include costs,³ and the creditor's attorney's fee, where the right thereto given by statute has accrued.⁴ Tender of the additional sum suggested as a reasonable attorney's fee by the plaintiff's attorney is sufficient.⁵ If the action has been instituted without making the statutory demand, and hence the defendant is not liable for costs, tender need not include costs.⁶ So if expenses authorized by law have been incurred on account of the debtor's default, such as advertising a sale under a deed of trust⁷ or expenses incurred by taking property under a chattel mortgage⁸ the tender must include such expenses. Tender of the amount found to be due by a court of original jurisdiction is insufficient to stop interest if the amount is increased on appeal.⁹ Tender of an insufficient sum is not made valid by the fact that the debtor in good faith believes that he is tendering all that is due.¹⁰ If the debtor owes several distinct claims to his creditor, he may tender payment of one of them, leaving the other unpaid.¹¹ The debtor must, in such case, notify the creditor that the tender is made for the specific debt. If without such notice, the

N. C. 486; McKibbin v. Peters, 185 Pa. St. 518; 40 Atl. 288; Warden v. Sweeney, 86 Wis. 161; 56 N. W. 647.

² Chicago, etc., Ry. v. Woodard, 159 Ind. 541; 65 N. E. 577; Louisiana Molasses Co. v. Le Sassier, 52 La. Ann. 2070; 28 So. 217; judgment affirmed, 52 La. Ann. 1768; 28 So. 223; Weld v. Bank, 158 Mass. 339; 33 N. E. 519.

³ Martin v. Whisler, 62 Ia. 416; 17 N. W. 593; Samuels v. Simmons (Ky.), 60 S. W. 937; Seeger v. Smith, 74 Minn. 279; 77 N. W. 3; McEldon v. Patton (Neb.), 93 N. W. 938; Burt v. Dodge, 13 Ohio 131; Berry v. Davis, 77 Tex. 191; 19 Am. St. Rep. 748; 13 S. W. 978.

⁴ Chicago, etc., Ry. v. Woodard, 159 Ind. 541; 65 N. E. 577. So where the mortgage provides for

an attorney's fee and such provisions are upheld. Fuller v. Brown, 167 Ill. 293; 47 N. E. 202; affirming, 68 Ill. App. 239.

⁵ Smith v. Jackson, 153 Ill. 399; 39 N. E. 130.

⁶ People's Furniture, etc., Co. v. Crosby, 57 Neb. 282; 73 Am. St. Rep. 504; 77 N. W. 658.

⁷ McNiece v. Eliason, 78 Md. 168; 27 Atl. 940; McClung v. Trust Co., 137 Mo. 106; 38 S. W. 578.

⁸ Gould v. Armagost, 46 Neb. 897; 65 N. W. 1064.

⁹ Wolfort v. Reilly, 133 Mo. 463; 34 S. W. 847; Neilson v. Ry., 91 Wis. 557; 64 N. W. 849.

¹⁰ Helphrey v. Ry., 29 Ia. 480; Patnote v. Sanders, 41 Vt. 66; 98 Am. Dec. 564.

¹¹ Carleton v. Whitcher, 5 N. H. 289.

debtor tenders to the creditor upon his entire indebtedness a sum less than the entire amount due, but greater than one of the debts, it is insufficient.¹²

§1419. Tender of greater amount than due.

If an amount greater than the amount of the indebtedness is tendered, it is sufficient if the surplus is to belong to the creditor,¹ or if change is already made, so that he can select the exact amount due, but it is insufficient if the creditor is required to make change.² It has been held, however, that a common carrier of passengers must furnish change to a reasonable amount, so that it is not unreasonable for a passenger to tender five dollars in one piece and ask for change in paying a five-cent fare.³

§1420. Place of making tender.

If the contract provides for the place of payment, tender may be made there even if the creditor is absent.¹ If no place of payment is fixed by the contract, tender must be made to the creditor in order to stop interest.² It is the duty of the debtor to find the creditor and make tender to him, and not the duty of the creditor to find the debtor and make demand for payment. The mere fact that a note is dated at a certain place does not make it payable there.³ So under a contract which provides for the delivery of chattels, tender should be made to the creditor at his residence or place of business, if the chattels are portable.⁴ If the creditor is absent from the state, the debtor

¹² Shuck v. Ry., 73 Ia. 333.

¹ Patterson v. Cox, 25 Ind. 261.

² Betterbee v. Davis, 3 Camp. 70; Cadman v. Lubbock, 5 D. & R. 289; Perkins v. Beck, 4 Cranch C. C. 68.

³ Barrett v. Ry., 81 Cal. 296; 15 Am. St. Rep. 61; 6 L. R. A. 336; 22 Pac. 859.

¹ Aldrich v. Albee, 1 Me. 120; 10 Am. Dec. 45; Wiggin v. Wiggin, 43 N. H. 567; 80 Am. Dec. 192; Roberts v. Beatty, 2 P. & W. (Pa.) 63;

21 Am. Dec. 410; Deel v. Berry, 21 Tex. 463; 73 Am. Dec. 236. Contract to deliver goods. Barney v. Bliss, 1 D. Chip. (Vt.) 399; 12 Am. Dec. 696.

² Galloway v. Smith, Litt. Sel. Cas. (Ky.) 132; McNair v. Moore, 55 S. C. 435; 73 Am. St. Rep. 760; 33 S. E. 491.

³ McNair v. Moore, 55 S. C. 435; 73 Am. St. Rep. 760; 33 S. E. 491.

⁴ Miles v. Roberts, 34 N. H. 245;

is not obliged to make personal tender to him.⁵ If the articles are not portable, the general rule seems to be that the debtor must call upon the creditor to indicate at what place he elects to receive such articles, and if he indicates a reasonable place tender must be made there.⁶ So a vendee who has an option to avoid liability by redelivery does not make a valid tender by notifying the vendor that he holds subject to the vendor's orders.⁷ So a statement in a pleading filed by a minor seeking to avoid liability for a sale induced by an alleged concealment by him of the fact of infancy, that the goods are in his possession and that the vendors could "come and get them if they chose," is not a sufficient tender.⁸

§1421. Conditions imposed by party making tender.—Conditions already imposed by law.

The debtor may attach a condition to the tender requiring the creditor to perform some act which he would be in any event legally bound to do without affecting the sufficiency of the tender.¹ Thus he may require the surrender of property which the creditor was holding under a lien to secure the debt of which tender was made,² or the surrender of property pledged to secure such debt,³ or the release of a mortgage given to secure such debt,⁴ or the reconveyance of property conveyed by a deed,

Santee v. Santee, 64 Pa. St. 473. *Contra*, the place is the residence of the debtor. *Grant v. Groshon*, Hard. (Ky.) 85; 3 Am. Dec. 725; *Chambers v. Winn*, Sneed (Ky.) 166; 2 Am. Dec. 713.

⁵ *Trimble v. Williamson*, 49 Ala. 525; *Angell v. Loomis*, 97 Mich. 5; 55 N. W. 1008; *Gill v. Bradley*, 21 Minn. 15.

⁶ *Mason v. Briggs*, 16 Mass. 453; *Currier v. Currier*, 2 N. H. 75; 9 Am. Dec. 43; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525; 21 Am. Dec. 161.

⁷ *Langston v. Bitting*, 96 Ga. 410; 23 S. E. 308.

⁸ *Adam Roth Grocery Co. v. Hop-*

kins (Ky.), 29 S. W. 293; rehearing denied, 30 S. W. 405.

¹ *Lamb v. Jeffrey*, 41 Mich. 719; 3 N. W. 204.

² *Johnson v. Cranage*, 45 Mich. 14; 7 N. W. 188.

³ *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435; 17 Pac. 69; *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468.

⁴ *Saunders v. Frost*, 5 Pick. (Mass.) 259; 16 Am. Dec. 394; *Halpin v. Ins. Co.*, 118 N. Y. 165; 23 N. E. 482. *Contra*, *Fields v. Danenhower*, 65 Ark. 392; 43 L. R. A. 519; 46 S. W. 938. *Contra*, in Indiana on the theory that the payment of the note discharges the

absolute on its face, but intended as a mortgage.⁵ A tender to one who claims as assignee of a mortgage debt, but whose title is denied by the original mortgagee, may be coupled with demand for the production of a written assignment of such debt or a release of the mortgage by the original mortgagee without destroying its validity.⁶

§1422. Conditions not imposed by law.

If, however, the debtor attempts to impose any conditions not required by law,¹ such as demanding that the tender be accepted as full performance,² or that a discharge³ or a release in full⁴ be given, or that a right of appeal be waived,⁵ or that in connection with the debt in question other claims between the same parties be settled,⁶ the tender is insufficient. Under a contract for a bond of indemnity a tender made on condition of furnishing a lease for the realty in question, instead of such bond, is insufficient.⁷ So it has been held that tender of the

mortgage *ipso facto*. Storey v. Krewson, 55 Ind. 397; 23 Am. Rep. 668.

⁵ Mankel v. Belscamper, 84 Wis. 218; 54 N. W. 500.

⁶ Kennedy v. Moore, 91 Ia. 39; 58 N. W. 1066.

¹ Fields v. Danenhowser, 65 Ark. 392; 43 L. R. A. 519; 46 S. W. 938; Jones v. Shuey (Cal.), 40 Pac. 17; Butler v. Hincley, 17 Colo. 523; Sanford v. Bulkley, 30 Conn. 344; Pulsifer v. Shepard, 36 Ill. 513; Rose v. Duncan, 49 Ind. 269; Latham v. Hartford, 27 Kan. 249; Chapin v. Chapin, 161 Mass. 138; 36 N. E. 746; Loring v. Cooke, 3 Pick. (Mass.) 48; McEldon v. Patton (Neb.), 93 N. W. 938; Schrandt v. Young, 62 Neb. 254; 86 N. W. 1085; Te Poel v. Shutt, 57 Neb. 592; 78 N. W. 288; Brace v. Doble, 3 S. D. 110; 52 N. W. 586; Elderkin v. Fellows, 60 Wis. 339.

² Moore v. Norman, 52 Minn. 83; 38 Am. St. Rep. 526; 18 L. R. A. 359; 53 N. W. 809; Ruppel v. Building Association, 158 Mo. 613; 59 S. W. 1000; Tompkins v. Batie, 11 Neb. 147; 38 Am. Rep. 361; 7 N. W. 747; Noyes v. Wyckoff, 114 N. Y. 204; 21 N. E. 158; Rand v. Harris, 83 N. C. 486; Pershing v. Feinberg, 203 Pa. St. 144; 52 Atl. 22; Doty v. Crawford, 39 S. C. 1; 17 S. E. 377.

³ Richardson v. Chemical Laboratory, 9 Met. (Mass.), 42.

⁴ Brown v. Gilmore, 8 Me. 107; 22 Am. Dec. 223; Loring v. Cooke, 3 Pick. (Mass.) 48.

⁵ Beardsley v. Beardsley, 86 Fed. 16; 29 C. C. A. 538.

⁶ Greenhill v. Hunton (Tex. Civ. App.), 69 S. W. 440.

⁷ National Bank v. Levanseler, 115 Mich. 372; 73 N. W. 399.

amount due on a note given for a conveyance of realty is insufficient where coupled with a demand for such conveyance.⁸ A tender of the amount due on a land contract has been held sufficient, though accompanied by a request for a conveyance.⁹ Even under a statute allowing the debtor to demand a receipt, he can demand a receipt only for the money paid in, and not a receipt in full.¹⁰ So a demand for the surrender of collateral to secure payment of the debt in question as well as other debts prevents a tender from being effective.¹¹ So a tender by A of personalty claimed by B, reserving to A the right to recover its value if it should be held to belong to A, is insufficient.¹² So tender of deeds and abstracts under a contract for the sale of realty is insufficient if coupled with a demand for a cash payment not required by the contract.¹³ The rejection of a valid conveyance tendered by the grantor and a demand for a conveyance of different form prevents a tender of the purchase price from being sufficient.¹⁴ Tender of the amount due with request for an assignment of the debt instead of payment is not sufficient.¹⁵ The debtor has a right, however, to use language showing that he does not admit that more is due. As long as he does not require the creditor to assent thereto as a condition of payment, the use of such language does not vitiate a tender. Thus tender by debtor of a sum "as a payment of the balance due on that mortgage," is sufficient if the amount is correct.¹⁶

⁸ Even under a statute allowing the debtor to demand a receipt. *Morris v. Ins. Co.*, 116 Ga. 53; 42 S. E. 474; *Elder v. Johnson*, 115 Ga. 691; 42 S. E. 51; *De Graffenried v. Menard*, 103 Ga. 651; 30 S. E. 560.

⁹ *Harding v. Giddings*, 73 Fed. 335; 19 C. C. A. 508.

¹⁰ *West v. Ins. Co.*, 117 Ia. 147; 90 N. W. 523.

¹¹ *Schmittdiel v. Moore*, 101 Mich. 590; 60 N. W. 279; *Fidelity, etc.*,

Co. v. Engleby, 99 Va. 168; 37 S. E. 957.

¹² *Perkins v. Brewery*, 134 Cal. 372; 66 Pac. 482.

¹³ *Breja v. Pryne*, 94 Ia. 755; 64 N. W. 669.

¹⁴ *Hyde v. Heller*, 10 Wash. 586; 39 Pac. 249.

¹⁵ *Cochran v. Jackman (Ky.)*, 56 S. W. 507; *Whittaker v. Roller Mill Co.*, 55 N. J. Eq. 674; 38 Atl. 289.

¹⁶ *Davies v. Dow*, 80 Minn. 223; 83 N. W. 50.

§1423. Demand for surrender of note when paid.

There is some conflict of authority as to whether a tender of the full amount of a negotiable instrument is insufficient when coupled with a demand for the surrender thereof. The better rule is that as the holder of the instrument ought to surrender it on payment, such tender is sufficient.¹ Some authorities, however, hold that a demand that a note should be surrendered where the note is mislaid² or not in the possession of creditor's attorney on whom such demand is made, this fact being known to the debtor,³ makes the tender insufficient by adding a condition that the law does not require.

§1424. Tender in equity.

In equity an offer of payment made in the pleadings is a sufficient tender as far as performance of a covenant to pay is concerned, or as far as such payment is a condition of equitable relief.¹

§1425. Waiver of elements of tender.—Waiver of actual production.

The creditor may, however, waive certain of these requisites of a valid tender. If the debtor is ready and willing to pay the money, the actual production of it may be waived by the absolute refusal of the creditor to accept it.¹ By statute refusal

¹ *Bailey v. Buchanan*, 115 N. Y. 297; 6 L. R. A. 562; 22 N. E. 155.

² *Holton v. Brown*, 18 Vt. 224; 46 Am. Dec. 148.

³ *Malone v. Wright*, 90 Tex. 49; 36 S. W. 420; modifying 34 S. W. 455.

¹ *Cæsar v. Capell*, 83 Fed. 403; *Hodges v. Verner*, 100 Ala. 612; 13 So. 679; *Crawford v. Liddle*, 101 Ia. 148; 70 N. W. 97; *Jopling v. Walton*, 138 Mo. 485; 40 S. W. 99; *Zebley v. Trust Co.*, 139 N. Y. 461; 34 N. E. 1067.

¹ *Hills v. Bank*, 105 U. S. 319; *O'Connor v. Morse*, 112 Cal. 31, 53

Am. St. Rep. 155; 44 Pac. 305; *Peckham v. Stewart*, 97 Cal. 147; 31 Pac. 928; *Hall v. Ins. Co.*, 57 Conn. 105; 17 Atl. 356; *Wood v. Bangs*, 2 Penne. (Del.) 435; 48 Atl. 189; *Blair v. Hamilton*, 48 Ind. 32; *Champion Machine Co. v. Mann*, 42 Kan. 372; *Sonia Cotton Oil Co. v. The Red River*, 106 La. 42; 87 Am. St. Rep. 294; 30 So. 303; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Jones v. Assurance Co.*, 120 Mich. 211; 79 N. W. 204; *Pinney v. Jorgensen*, 27 Minn. 26; 6 N. W. 376; *Stephenson v. Kilpatrick*, 166 Mo. 262; 65 S. W. 773;

to accept an offer of performance excuses production of the thing to be delivered in performance. This includes payment of money.² Thus the mortgagee's denial of the mortgagor's right to make such payment excuses formal tender.³ So does a denial of the right of one seeking to redeem for non-payment of taxes.⁴ So does the creditor's refusal to accept payment of a debt for which he holds a lien on a horse unless another debt not a lien is also paid,⁵ or demand of interest for an excessive period.⁶ If the debtor offers to pay the amount due and is able to produce it in a few minutes actual tender is excused by the creditor's refusal to accept. So if the debtor states that he has money in a bank in the same building as that in which the conversation occurs, and offers to get it and pay the debt, the refusal of the creditor to receive it waives actual production of the money.⁷ The same principle applies where the money is in another bank in the same town and can be reached in a few minutes.⁸ A refusal to accept, coupled with a demand for the production of the money, does not waive its production.⁹ The same principle applies to a refusal to accept a tender of chattels, as a stock certificate.¹⁰ So an offer to convey a patent right is sufficient tender where such offer is refused.¹¹ The debtor must, however, have been willing and able to make tender, and

Girard v. Wheel Co., 123 Mo. 358; 45 Am. St. Rep. 556; 25 L. R. A. 514; 27 S. W. 648; McCormick v. Hickey, 56 N. J. Eq. 848; 42 Atl. 1019; Brock v. Hidy, 13 O. S. 306; Westmoreland, etc., Co. v. De Witt, 130 Pa. St. 235; 5 L. R. A. 731; 18 Atl. 724; Hampton v. Spekenagle, 9 S. & R. (Pa.) 212; 11 Am. Dec. 704; McPherson v. Fargo, 10 S. D. 611; 66 Am. St. Rep. 723; 74 N. W. 1057; Rogers v. Tindall, 99 Tenn. 356; 42 S. W. 86; Koon v. Snodgrass, 18 W. Va. 320; Griesemer v. Ins. Co., 10 Wash. 202; 38 Pac. 1031; Wright v. Young, 6 Wis. 127; 70 Am. Dec. 453.

² Latimer v. Land Co., 137 Cal. 286; 70 Pac. 82.

³ Shank v. Groff, 45 W. Va. 543; 32 S. E. 248.

⁴ Poling v. Parsons, 38 W. Va. 80; 18 S. E. 379.

⁵ Bowden v. Dugan, 91 Me. 141; 39 Atl. 467.

⁶ Stewart v., Henry County, 66 Fed. 127.

⁷ Smith v. Loan Association, 119 N. C. 257; 26 S. E. 40.

⁸ Steckel v. Standley, 107 Ia. 694; 77 N. W. 489.

⁹ Niederhauser v. Ry., 131 Mich. 550; 91 N. W. 1028.

¹⁰ Williams v. Patrick, 177 Mass. 160; 58 N. E. 583.

¹¹ Adams v. Turner, 73 Conn. 38; 46 Atl. 247.

the refusal must have prevented a tender which he was about to make, to excuse the actual production of the money,¹² as where the vendor under an executory contract of sale insisted that the contract was forfeited and conveyed to another.¹³ Thus if the creditor refuses to accept legal-tender notes and demands coin,¹⁴ or refuses to accept anything less than an excessive amount,¹⁵ or refuses to deal with the debtor,¹⁶ or refuses to remain long enough to give the debtor an opportunity to count out the money,¹⁷ actual tender is waived. A public officer is not such an agent of the party for whose benefit he may be required to act, that he has general authority to waive elements of tender. However, if the officer to whom by law tender should be made voluntarily accepts something which is not legal tender, such as a check¹⁸ or a certificate of deposit,¹⁹ this is sufficient to keep the tender good. This is especially true where money has been tendered to the sheriff and he has requested that a check be given instead. Thus a mortgage debt was payable in gold coin. To redeem the property after sale tender of the proper amount of gold coin was made to the sheriff. He asked for a certified check instead. The coin was thereupon deposited in the bank, and a certified check obtained which was delivered to the sheriff. The check was not expressly made payable in gold coin, but when cashed by the sheriff it was in fact paid in gold. This was held to be a sufficient tender.²⁰

¹² *McCalley v. Otey*, 99 Ala. 584; 42 Am. St. Rep. 87; 12 So. 406; *Shank v. Groff*, 45 W. Va. 543; 32 S. E. 248.

¹³ *McWhirter v. Crawford*, 104 Ia. 550; 72 N. W. 505. Modified on rehearing, 73 N. W. 1021.

¹⁴ *Hanna v. Ratekin*, 43 Ill. 462.

¹⁵ *Ashburn v. Poulter*, 35 Conn. 553.

¹⁶ *Sands v. Lyon*, 18 Conn. 18.

¹⁷ *Schayer v. Loan Co.*, 163 Mass. 322; 39 N. E. 1110; *Raines v. Jones*, 4 Humph. (Tenn.) 490.

¹⁸ Paid to Sheriff. *Hooker v.*

Burr, 137 Cal. 663; 70 Pac. 778. Paid to clerk of court. *Jessup v. Carey*, 61 Ind. 584. Paid to register of deeds. *Carter v. Lewis*, 27 Mich. 241.

¹⁹ Paid to the clerk. *Steckel v. Standley*, 107 Ia. 694; 77 N. W. 489. *Contra*, a certificate of deposit payable to the order of the clerk was held not sufficient to keep a tender good. *Smith v. Bank*, 14 Ohio C. C. 199; 8 Ohio C. D. 176.

²⁰ *Hooker v. Burr*, 137 Cal. 663; 70 Pac. 778.

§1426. Refusal on specific ground a waiver of other grounds.

Refusal of tender based on a specific ground of objection,¹ such as the insufficiency of the amount tendered² or on the ground that the contract has already been discharged by an alleged breach,³ waives objection to the medium in which the tender is made, as that it is made in bank-notes which are not legal tender,⁴ or partly in silver certificates which were not legal tender,⁵ or that it is made by check,⁶ or was made a day or so before maturity.⁷ So a refusal to accept a tender made at a place different from that fixed by the contract as the place of payment waives objection to the place if not on that ground.⁸ So a refusal of tender on the ground that the amount is too small, waives the objection that the amount tendered was too large and that change was demanded.⁹ Slight deficiencies in the amount tendered may be waived by a refusal based upon some other specified ground. So a refusal to accept a tender unless another claim should be paid waives the objection that interest is not included.¹⁰ So tender of water rental which does not

¹ Thayer v. Meeker, 86 Ill. 470; Whelan v. Reilley, 61 Mo. 565; Ricketts v. Buckstaff, 64 Neb. 851; 90 N. W. 915; Koon v. Snodgrass, 18 W. Va. 320.

² Pearson's Estate, 102 Cal. 569; 36 Pac. 934.

³ McGrath v. Gegner, 77 Md. 331; 39 Am. St. Rep. 415; 26 Atl. 502.

⁴ Koehler v. Buhl, 94 Mich. 469; 54 N. W. 157; Beebe v. Knapp, 28 Mich. 53; Lacy v. Wilson, 24 Mich. 479; Fosdick v. Van Husan, 21 Mich. 567.

⁵ Ritchie v. Ege, 58 Minn. 291; 59 N. W. 1020.

⁶ Sloan v. Petrie, 16 Ill. 262; Bonaparte v. Thayer, 95 Md. 548; 52 Atl. 496; McGrath v. Gegner, 77 Md. 331; 39 Am. St. Rep. 415; 26 Atl. 502; Henderson v. Bass County, 107 Mo. 50; 18 S. W. 992; Mitchell v. Mining Co., 67 N. Y. 280; Jennings v. Mendenhall, 7 O.

S. 257; Pershing v. Feinberg, 203 Pa. St. 144; 52 Atl. 22. So with a certified check. Beckham v. Puckett, 88 Mo. App. 636. Or an order. Hall v. Appell, 67 Conn. 585; 35 Atl. 524.

⁷ Thompson v. Lyon, 40 W. Va. 87; 20 S. E. 812.

⁸ Union Mutual Life Ins. Co. v. Plaster Co., 37 Fed. 286; 3 L. R. A. 90. (Tender was refused because the mortgagee insisted that the mortgagor improve the mortgaged property.) Slesinger v. Bresler, 110 Mich. 198; 68 N. W. 128 (tender of notes agreed to be taken as payment refused because the creditor had changed his mind).

⁹ People's Furniture, etc., Co. v. Crosby, 57 Neb. 282; 73 Am. St. Rep. 504; 77 N. W. 658.

¹⁰ Christenson v. Nelson, 38 Or. 473; 63 Pac. 648.

include a lawful "carriage fee," but which is refused on the sole ground that an alleged royalty to which the creditor had no legal right is not included, is sufficient.¹¹ But under a statute making failure to make an "objection to money" a waiver of such objection, objection to the amount is not waived, the statute being held to refer to the kind of money.¹² By statute failure to make objections at the time of tender waives all that the creditor then had an opportunity to make. This includes objection to the amount as insufficient,¹³ or that the debtor in making tender demanded that the creditor execute an instrument which he was not bound to execute,¹⁴ but not to such a deficiency as an offer of ten dollars on a claim of twenty thousand dollars.¹⁵ The uncommunicated intention of the creditor to refuse tender is not an excuse for omitting to make actual tender.¹⁶ Tender as a condition precedent to maintaining an action may be waived by an answer denying liability on a distinct ground.¹⁷

§1427. Keeping tender good.

After tender is duly made it must, to preserve its legal effect, be kept good;¹ that is, the person making the tender must keep enough money on hand after the date of the tender to make the payment if called upon;² and he must not make profit of it.³ It is not necessary, however, that the identical money tendered should be kept on hand continuously.⁴ Under the practice in

¹¹ Northern Colorado Irrigation Co. v. Richards, 22 Colo. 450; 45 Pac. 423.

¹² McWhirter v. Crawford, 104 Ia. 550; 72 N. W. 505; modified on rehearing, 73 N. W. 1021.

¹³ Latimer v. Land Co., 137 Cal. 286; 70 Pac. 82 (as that interest is not included).

¹⁴ Kofoed v. Gordon, 122 Cal. 314; 54 Pac. 1115.

¹⁵ Colton v. Bank, 137 Cal. 376; 70 Pac. 225.

¹⁶ Bluntzer v. Dewees, 79 Tex. 272.

¹⁷ Martin v. Bank, 131 N. C. 121; 42 S. E. 558.

¹ Dunn v. Hunt, 63 Minn. 484; 65 N. W. 948; Gauche v. Milbrath, 94 Wis. 674; 69 N. W. 999.

² Beardsley v. Beardsley, 86 Fed. 16; 29 C. C. A. 538; Thayer v. Meeker, 86 Ill. 470; Slack v. Price, 1 Bibb. (Ky.) 272.

³ Middle States, etc., Co. v. Matress Co., 82 Md. 506; 33 Atl. 886; Sanders v. Bryen, 152 Mass. 141; 9 L. R. A. 255; 25 N. E. 86.

⁴ Cheney v. Bilby, 74 Fed. 52; 20 C. C. A. 291; Thompson v. Lyon, 40 W. Va. 87; 20 S. E. 812.

force in most jurisdictions tender must be pleaded as a defense,⁵ and the money paid into court;⁶ and so in equity,⁷ if it is desired to save interest and costs. Hence a pleading of tender that does not allege a continuing offer and a payment into court is insufficient.⁸ In some jurisdictions payment into court while necessary to discharge a mortgage securing the debt is not necessary to stop interest and costs.⁹

§1428. Effect of tender.

If tender is refused, the question whether the contract is discharged or not depends on whether the contract requires payment in money or other performance. If the contract provides for performance other than payment in money, a refusal of tender operates as a discharge.¹ If the contract provides for payment in money, refusal of tender does not discharge the contract as far as the liability of the principal creditor is concerned,² though it stops interest³ and costs,⁴ provided the tender is kept good. To discharge interest, however, the tender must

⁵ *National, etc., Co. v. Machine Co.*, 181 Mass. 275; 63 N. E. 900.

⁶ *Deacon v. Investment Co.*, 95 Ia. 180; 63 N. W. 673; *Clark v. Neumann*, 56 Neb. 374; 76 N. W. 892; *Felker v. Hazelton*, 68 N. H. 303; 38 Atl. 1051; *Bahmann v. Stone*, 59 O. S. 497; 52 N. E. 1022; *Shank v. Groff*, 45 W. Va. 543; 32 S. E. 248.

⁷ *Commercial Bank v. Crenshaw*, 103 Ala. 497; 15 So. 741; *West v. Ins. Co.*, 117 Ia. 147; 90 N. W. 523.

⁸ *Terrell Coal Co. v. Lacey (Ala.)*, 31 So. 109.

⁹ *Parker v. Beasley*, 116 N. C. 1; 33 L. R. A. 231; 21 S. E. 955.

¹ *Mitchell v. Merrill*, 2 Blackf. (Ind.) 87; 18 Am. Dec. 128; *De Long v. Wilson*, 80 Ia. 216; 45 N. W. 764; *Wyman v. Winslow*, 11 Me. 398; 26 Am. Dec. 542; *Shannon v. Comstock*, 21 Wend. (N. Y.) 457; 34 Am. Dec. 262; *Barney v. Bliss*,

1 D. Chip. (Vt.) 399; 12 Am. Dec. 696.

² *Mohn v. Stoner*, 11 Ia. 30; *Suffolk Bank v. Bank*, 5 Pick. (Mass.) 106; *Snyder v. Quarton*, 47 Mich. 211; 10 N. W. 204; *Ruppel v. Building Association*, 158 Mo. 613; 59 S. W. 1000; *Stowell v. Read*, 16 N. H. 20; 41 Am. Dec. 714; *Preston v. Grant*, 34 Vt. 201.

³ *Cheney v. Libbey*, 134 U. S. 68; *Peugh v. Davis*, 113 U. S. 542; *Bailey v. Buchanan County*, 115 N. Y. 297; 6 L. R. A. 562; 22 N. E. 155; *Tuthill v. Morris*, 81 N. Y. 94; *Parker v. Beasley*, 116 N. C. 1; 33 L. R. A. 231; 21 S. E. 955.

⁴ *McCalley v. Otey*, 99 Ala. 584; 42 Am. St. Rep. 87; 12 So. 406; *Wing v. Blocker*, 115 Ga. 778; 42 S. E. 67; *Saunders v. King*, 119 Ia. 291; 93 N. W. 272; *Cohoon v. Kineon*, 46 O. S. 590; 22 N. E. 722.

be kept good.⁵ If the tender is not kept good, and the debtor makes use of the money tendered by him, after tender is refused, he is liable for interest.⁶ Since a tender of less than the full amount is insufficient in law it does not prevent recovery of costs in a subsequent action.⁷ A surety is discharged by refusal of tender made by him with the demand that the debt be assigned to him.⁸

§1429. Tender conclusive as to debtor's liability.

Tender followed by payment into court establishes the debtor's liability to that amount,¹ and the money so paid in becomes the property of the creditor.² It is therefore error on overruling plaintiff's demurrer to defendant's answer, to allow the defendant to take the amount so paid in.³ So if tender is pleaded and kept good in an action in foreclosure it is error to find that there has been no breach of condition.⁴ Where the verdict should be for the difference, if any, between the amount so paid in and the amount found due, it is error to deduct the amount paid in from the amount of the verdict in rendering judgment.⁵ Tender does not, of course, prevent the debtor from setting up a counterclaim covering the difference between the amount tendered and the amount claimed.⁶ This rule does not apply in admiralty.⁷

§1430. Effect of tender on collateral security.

Since performance cannot be tendered before maturity tender before the day for payment does not discharge the lien

⁵ *McCalley v. Otis*, 99 Ala. 584;
42 Am. St. Rep. 87; 12 So. 406.

⁶ *Sanders v. Bryer*, 152 Mass. 141;
9 L. R. A. 255; 25 N. E. 86.

⁷ *Elder v. Elder*, 43 Kan. 514; 23
Pac. 600; *Elsanger v. Grovjohn*,
29 Neb. 139; 45 N. W. 273.

⁸ *O'Connor v. Morse*, 112 Cal. 31;
53 Am. St. Rep. 155; 44 Pac. 305.

¹ *Supply Ditch Co. v. Elliott*, 10
Colo. 327; 3 Am. St. Rep. 586; 15
Pac. 691; *Fox v. Williams*, 92 Wis.
320; 66 N. W. 357.

² *Munk v. Kanzler*, 26 Ind. App.
105; 58 N. E. 543.

³ *Supply Ditch Co. v. Elliott*, 10
Colo. 327; 3 Am. St. Rep. 586; 15
Pac. 691.

⁴ *Uedelhofen v. Mason*, 201 Ill.
465; 66 N. E. 364; affirming, 102
Ill. App. 116.

⁵ *Duckwall v. Jones*, 156 Ind. 682;
58 N. E. 1055; affirmed on rehear-
ing, 156 Ind. 682; 60 N. E. 797.

⁶ *Young v. Borzone*, 26 Wash. 4,
23; 66 Pac. 135, 421.

⁷ *The Mona* (1894), P. 265.

of the mortgage.¹ Tender of the amount of a debt secured by mortgage discharges the mortgage if made before condition broken on the day fixed by the contract for payment.² It has been held, however, that such tender will not avoid the lien of the mortgage unless the tender is kept good by paying the money into court,³ and the discharge of the mortgage is said to date only from the date of payment into court.⁴ If condition is broken and tender of the debt is made after that time, with interest down to the time of making tender, some courts hold that such tender discharges the mortgage.⁵ Such a tender has been held to discharge a lien in the nature of a mortgage created by a lease of water power.⁶ Other courts hold that such tender does not discharge the mortgage.⁷ So a tender by attaching creditors of a mortgagor discharges the lien of a mortgage.⁸ A tender, kept good, has been held to divest the lien of a chattel mortgage.⁹ To discharge the lien of a mortgage the tender must be so far free from conditions that it would be sufficient to stop interest and costs. If conditions are imposed by the party who makes the tender in excess of those imposed by law, the tender is ineffective.¹⁰

¹ Moore v. Kime, 43 Neb. 517; 61 N. W. 736.

² Jones v. Guaranty, etc., Co., 101 U. S. 622; Shields v. Lozear, 34 N. J. L. 496; 3 Am. Rep. 256.

³ Parker v. Beasley, 116 N. C. 1; 33 L. R. A. 231; 21 S. E. 955.

⁴ American, etc., Co. v. Githens, 57 N. J. Eq. 539; 41 Atl. 405.

⁵ Renard v. Clink, 91 Mich. 1; 30 Am. St. Rep. 458; 51 N. W. 692; Werner v. Tuch, 127 N. Y. 217; 24 Am. St. Rep. 443; 27 N. E. 845.

⁶ Gordon v. Hydraulic Co., 117 Mich. 620; 76 N. W. 142.

⁷ Perre v. Castro, 14 Cal. 519; 76 Am. Dec. 444; Rowell v. Mitchell, 68 Me. 21; Holman v. Bailey, 3 Met. (Mass.) 55; Hudson Bros.

Commission Co. v. Gravel Co., 140 Mo. 103; 62 Am. St. Rep. 722; 41 S. W. 450. (In this case the earlier and to some extent inconsistent Missouri cases are discussed. In McClung v. Trust Co., 137 Mo. 106; 38 S. W. 578, there had been no tender in fact, but the court expressed the opinion that such a tender might stop interest but could not discharge the mortgage.) Shields v. Lozear, 34 N. J. L. 496; 3 Am. Rep. 256.

⁸ Felker v. Hazelton, 68 N. H. 303; 38 Atl. 1051.

⁹ Gould v. Armagost, 46 Neb. 897; 65 N. W. 1064.

¹⁰ Moore v. Norman, 52 Minn. 83; 38 Am. St. Rep. 526; 18 L. R. A. 359; 53 N. W. 809.

CHAPTER LXX.

BREACH.

I. GENERAL NATURE.

§1431. Nature of breach.

Breach of contract may be made in either of two ways. (1) One party to the contract may by word or act indicate that the contract is no longer binding upon him, and the adversary party may elect to treat this as breach. The chief classes of breach of this sort are as follows: (a) One party to the contract may renounce the obligation of the contract and treat it as no longer binding upon him. In certain classes of cases this will give the adversary party the right to treat such conduct as breach where it occurs before performance is due.¹ In all classes of contracts such renunciation when performance is due gives the adversary party the right at his election to treat the contract as discharged,² and in certain classes of cases he is required to accept it as a discharge, leaving him his right of action for damages. (b) One party to a contract may make performance impossible, either on his own part or on the part of the adversary party. This may occur either before performance is due or when performance is due.³ (2) The other way in which breach may occur is where one party, without in any way repudiating his obligation under the contract, either does not perform or tenders defective performance which is not even substantial performance.

§1432. Effect of breach.

Until breach no cause of action arises on a contract.¹ Upon breach a cause of action arises in favor of the party not in de-

¹ See § 1436 *et seq.*

² See § 1442.

³ See § 1443 *et seq.*

¹ *Tillinghast v. Lumber Co.*, 39 S. C. 484; 22 L. R. A. 49; 18 S. E. 120.

fault, and against the party in default.² Breach of contract may have three different results according to the circumstances of the case and the election of the party not in default. (1) The party not in default may maintain an action for damages against the party in default,³ or under proper circumstances he may sue in equity for specific performance.⁴ (2) The party not in default may, in some cases, elect to treat such breach as discharge, refuse to perform further, and use such breach as a defense.⁵ (3) The party not in default may in some cases treat such breach as a discharge of the contract *ab initio* and recover a reasonable compensation for what he has done under it, as if there had been no express contract at all, but merely an implied contract to compensate him for what he has done.⁶

§1433. Treatment of topic of breach.

Strict adherence to logical arrangement would probably require a discussion; first, of what facts amount to breach, and, second, of the effect of breach. This arrangement will be followed as far as economy of space will permit. The question whether certain facts, such as renunciation, amount to breach depends in so many cases upon the further question whether breach as a ground for recovering damages, or breach as a ground for treating the contract as discharged is intended, that some discussion of the effect of breach is necessary in connection with a discussion of what amounts to breach, in order to avoid a wasteful repetition of the same principles under different heads.

§1434. Breach gives right of election to party not in default.

Breach even of the sort that may discharge the adversary

² *Montgomery v. Hunt*, 99 Ga. 499; 27 S. E. 701; *Pungs v. Brake Beam Co.*, 200 Ill. 306; 65 N. E. 645.

³ See Ch. LXXIII.

⁴ See Ch. LXXV. For negative specific performance by injunction. see Ch. LXXVI.

⁵ See *post*, this chapter.

⁶ See Ch. LXXIV.

party does not necessarily have that effect. Breach by one party gives the adversary party an election in so far as his exercise of the right of election does not increase the damages resulting from the breach.¹ The adversary party not being in default may (1) treat the breach as a discharge, or (2) treat the breach as not affecting the contract, and the contract as still being in force. The choice of the former alternative by the party not in default operates as a final discharge of the contract in the absence of a subsequent waiver thereof acquiesced in by both parties. If a breach by the promisor is accepted as discharge by the promisee, the subsequent offer of the promisor to perform does not prevent the contract from operating as a discharge,² nor does it give the promisor the right to recover on the contract;³ nor does it prevent him from being liable for breach of such contract.⁴ Choice of the latter alternative by the party not in default has certain definite consequences. (a) If the party in default wishes to perform after such default he may

1 "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of

it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstance which may have afforded him the means of mitigating his loss." *Frost v. Knight*, L. R. 7 Ex. 111, 112; quoted in *Roehm v. Horst*, 178 U. S. 1, 11.

2 Contract to convey realty. *Clover v. Gottlieb*, 50 La. Ann. 568; 23 So. 459. Contract for constructing waterworks. *Grand Haven v. Waterworks*, 99 Mich. 106; 57 N. W. 1075. Breach by employee of contract of employment. *Tennessee Mfg. Co. v. James*, 91 Tenn. 154; 30 Am. St. Rep. 865; 15 L. R. A. 211; 18 S. W. 262.

3 *The Akaba*, 54 Fed. 197.

4 *Emack v. Hughes*, 74 Vt. 382; 52 Atl. 1061.

do so⁵ and recover under the contract,⁶ less the amount of damages, if any, caused by delay. In such case the contract is not discharged, but remains in full force. (b) If before the party not in default has accepted the breach as discharging the contract, such contract becomes impossible of performance, it will be discharged.⁷ To operate as such discharge, however, the impossibility must be of the sort that would operate as a discharge if it existed before breach. (c) If the party originally in default performs, before the adversary party elects to treat it as a breach, his rights under the contract stand as if the contract had never been broken,⁸ except as concerns his liability for damages. Subsequent breach by the party not in default may prevent the latter from recovery, and in such case he cannot revert to the original breach as a discharge. Thus A was to manufacture certain cars for a railroad, using in part material furnished by the railroad. This material was not furnished when due, and A was delayed in commencing work. Instead of treating this as a discharge A performed when the material arrived. Before A had delivered the cars they were destroyed by fire. It was held that A could not recover from the railroad, since the fire was in no way caused by the delay in furnishing material, and such breach was waived as a ground of discharge by A's continuing performance.⁹

§1435. Election of party not in default cannot increase damages.

A breach which goes to the entire performance may relieve the party in default from further liability under the contract except to pay damages occasioned by such breach.¹ If the adversary party has already performed his part of the contract

⁵ *Orr v. Cooledge*, 117 Ga. 195;
43 S. E. 527; *Lapsley v. Howard*,
119 Mo. 489; 24 S. W. 1020.

⁶ *Orr v. Cooledge*, 117 Ga. 195;
43 S. E. 527.

⁷ *Avery v. Bowden*, 5 E. & B. 714.

⁸ *Pratt v. Mfg. Co.*, 115 Wis. 648;
92 N. W. 368.

⁹ *McConihe v. R. R.*, 20 N. Y.
495; 75 Am. Dec. 420.

¹ *Heiser v. Mears*, 120 N. C. 443;
27 S. E. 117; *Davis v. Bronson*, 2
N. D. 300; 33 Am. St. Rep. 783; 16
L. R. A. 655; 50 N. W. 836; *Wando
Phosphate Co. v. Gibbon*, 28 S. C.
418; 13 Am. St. Rep. 690; 5 S. E.
837; *Chicago, etc., Co. v. Barry*
(Tenn. Ch. App.), 52 S. W. 451.

fully, such breach fixes the rights of the parties in any event, and the question of the effect of further performance by such party cannot arise. More difficult questions arise when the adversary party, not being himself in default, has still covenants to be performed when the breach occurs. The adversary party cannot ignore the breach, perform the covenants of the contract on his part to be performed and recover the entire contract price as if no breach had occurred.² This state of facts often exists in breach by renunciation.³ Thus after the owner has repudiated a building contract⁴ or a contract for constructing a monument⁵ the contractor cannot continue performance and recover the contract price. If the owner knows that the contractor will not complete the building according to contract, he must either take the building and use reasonable efforts to complete it or abandon it to the contractor; but he cannot let it remain unfinished and increase damages either for deterioration or loss of rental value.⁶ So if an executory contract for the sale of goods is broken by renunciation the vendor cannot send the goods to the vendee and maintain an action for the contract price.⁷ So an employe who is wrongfully discharged cannot, by the weight of authority, treat the contract as still in force and continue to tender his services, and recover the installments of his wages as if the contract were still in force.⁸ After an employer has broken a contract to employ another at work in phosphate mines, such other cannot treat the contract as still

² *Moline Scale Co. v. Beed*, 52 Ia. 307; 35 Am. Rep. 272; 3 N. W. 96; *Collins v. Delaporte*, 115 Mass. 159; *Butler v. Butler*, 77 N. Y. 472; 33 Am. Rep. 648; *Stanford v. McGill*, 6 N. D. 536; 38 L. R. A. 760; 72 N. W. 938; *Danforth v. Walker*, 37 Vt. 239; s. c., 40 Vt. 257; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120; 41 Am. St. Rep. 33; 58 N. W. 232.

³ *Gibbons v. Bente*, 51 Minn. 499; 22 L. R. A. 80; 53 N. W. 756; *Davis v. Bronson*, 2 N. D. 300; 33 Am. St. Rep. 783; 16 L. R. A. 655; 50 N. W. 836.

⁴ *Gibbons v. Bente*, 51 Minn. 499;

22 L. R. A. 80; 53 N. W. 756; *Davis v. Bronson*, 2 N. D. 300; 33 Am. St. Rep. 783; 16 L. R. A. 655; 50 N. W. 836.

⁵ *Wigent v. Marrs*, 130 Mich. 609; 90 N. W. 423.

⁶ *Eaton v. Gladwell*, 121 Mich. 444; 80 N. W. 292.

⁷ *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140; 94 Am. St. Rep. 112; 59 L. R. A. 122; 42 S. E. 378; *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 436; 17 Am. St. Rep. 788; 18 Atl. 1053.

⁸ See §§ 1353, 1442.

in force and continue to enter the mine. He may be treated as a trespasser.⁹ The same principles apply in cases of breach by defective performance. Thus one who accepts and uses defective machinery after knowing of the defects cannot thereby increase damages.¹⁰ So if a leaky boiler is furnished under a contract guaranteeing it to be first-class, the vendee cannot continue to use it after knowing of the defect and increase damages.¹¹ Still less can the adversary party continue performance after breach, perform in part, and recover for such partial performance on *quantum meruit*.¹²

II. RENUNCIATION BEFORE PERFORMANCE.

§1436. Renunciation before performance is due excuses adversary from tendering performance.

While a contract is still executory on both sides, the renunciation of it by one of the parties thereto before the time for performance has arrived has, or may have, important legal consequences. What these consequences are is a question upon some branches of which the courts are practically unanimous; while upon other branches they are by no means as unanimous as certain statements of the law would lead us to believe. Renunciation by one party excuses the other from any further offer to perform.¹ Thus a contract to sell² or to make and de-

⁹Wando Phosphate Co. v. Gibbon, 28 S. C. 418; 13 Am. St. Rep. 690; 5 S. E. 837.

¹⁰Thompson Mfg. Co. v. Gunder-son, 106 Wis. 449; 49 L. R. A. 859; 82 N. W. 299.

¹¹Milwaukee Boiler Co. v. Duncan, 87 Wis. 120; 41 Am. St. Rep. 33; 58 N. W. 232.

¹²McGregor v. Ross, 96 Mich. 103; 55 N. W. 658.

¹Lovell v. Hammond Co., 66 Conn. 500; 34 Atl. 511; Watson v. White, 152 Ill. 364; 38 N. E. 902; Heinlein v. Ins. Co., 101 Mich. 250;

45 Am. St. Rep. 409; 25 L. R. A. 627; 59 N. W. 615; Stahelin v. Sowle, 87 Mich. 124; 49 N. W. 529; Lowe v. Harwood, 139 Mass. 133; 29 N. E. 538; Hampton v. Specken-agle, 9 S. & R. (Pa.) 212; 11 Am. Dec. 704; Barnes v. Morrison, 97 Va. 372; 34 S. E. 93. To the same effect see the obiter in Stanford v. Magill, 6 N. D. 536; 38 L. R. A. 760; 72 N. W. 938.

²Roehm v. Horst, 178 U. S. 1; affirming, 91 Fed. 345; 33 C. C. A. 550; Walsh v. Myers, 92 Wis. 397; 66 N. W. 250.

liver³ certain goods is so far discharged by renunciation by the vendee that it is not necessary for the vendor to tender the thing sold or to make and tender the thing to be made. Thus if A has agreed to make steel rails for B to be drilled as B directs, B's refusal to give directions, and subsequent refusal to take any rails excuses A from making, drilling and tendering them.⁴ So under a contract to make wagons⁵ or to print books⁶ refusal to accept excuses tender. So renunciation of an insurance policy excuses subsequent tender of assessments due thereunder.⁷ So renunciation of a contract to sell land excuses tender of the purchase price and demand for the deed.⁸ So renunciation by a creditor of a contract to accept a three months' note if indorsed by a responsible indorser excuses the debtor from his obligation of preparing and tendering such note.⁹

§1437. Right of action before performance is due.

Whether renunciation by one party before performance is due is a breach which gives the adversary party a right to sue in damages before the time for such performance has arrived is a question upon which there is considerable difference of judicial opinion. In some cases the doctrine that renunciation by one party before performance from him is due operates as a breach so that the adversary party may, if he sees fit, sue at once for damages, is laid down broadly and without qualification.¹ An examination of the authorities shows that the appli-

³ *Hinckley v. Steel Co.*, 121 U. S. 264; *Kingman v. Wagon Co.*, 176 Ill. 545; 52 N. E. 328; *Farwell v. Solomon*, 170 Mass. 457; 49 N. E. 738.

⁴ *Hinckley v. Steel Co.*, 121 U. S. 264.

⁵ *Kingman v. Wagon Co.*, 176 Ill. 545; 52 N. E. 328.

⁶ *Farwell v. Solomon*, 170 Mass. 457; 49 N. E. 738.

⁷ *Heinlein v. Ins. Co.*, 101 Mich. 250; 45 Am. St. Rep. 409; 25 L. R. A. 627; 59 N. W. 615.

⁸ *Watson v. White*, 152 Ill. 364; 38 N. E. 902

⁹ *Lovell v. Hammond Co.*, 66 Conn. 500; 34 Atl. 511. (The creditor had agreed to prepare such note, but prepared a note payable on demand, and refused to prepare a three months' note.)

¹ *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460; *Cort v. Ry.*, 17 Q. B. (79 E. C. L.) 127; *Danube, etc., Co. v. Xenos*, 11 C. B. N. S. 152; *Roehm v. Horst*, 178 U. S. 1; affirming, 91 Fed. 345; 33 C. C. A. 550; *Smoot's Case*, 15 Wall. (U. S.) 36; *Marks v. Van Eeghen*, 85 Fed. 853; 30 C. C. A. 208; *Edward Hines Lumber Co. v. Alley*, 73 Fed. 603;

cation of this doctrine is generally limited to certain classes of cases: (1) In a contract to intermarry, renunciation by either party before the time for performance operates as such a breach that the adversary party may bring action at once for damages before the time for performance has arrived.² Thus where A and B agree to intermarry upon the death of A's divorced wife, A's marriage to another woman while his divorced wife is still living is such a breach that B could maintain action at once.³ (2) In a contract for personal services, renunciation by either party before the time for performance has begun gives the other a right to maintain an action at once without waiting for such time of performance to arrive.⁴ (3) In a contract to deliver goods, renunciation by the vendee before the time for delivery and payment gives the vendor a right to maintain an action at once without waiting for the time at which such delivery was to be made.⁵ Thus a contract to sell hops⁶ or stock⁷ is broken by renunciation before the time of performance arrives, so as to give the adversary party an action

19 C. C. A. 599; *Foss-Schneider Brewing Co. v. Bullock*, 59 Fed. 83; 8 C. C. A. 14; *Lake Shore, etc., Ry. v. Richards*, 152 Ill. 59; 30 L. R. A. 23; 38 N. E. 773; *Roebeling's Sons v. Fence Co.*, 130 Ill. 660; 22 N. E. 518; *Kurtz v. Frank*, 76 Ind. 594; 40 Am. Rep. 275; *McCormick Machine Co. v. Markert*, 107 Ia. 340; 78 N. W. 33; *McCormick v. Basal*, 46 Ia. 235; *Dugan v. Anderson*, 36 Md. 567; 11 Am. Rep. 509; *Platt v. Brand*, 26 Mich. 173; *Hosmer v. Wilson*, 7 Mich. 294; 74 Am. Dec. 716; *O'Neil v. Supreme Council*, — N. J. L. —; 57 Atl. 463; *Windmuller v. Pope*, 107 N. Y. 674; 14 N. E. 436; *Hocking v. Hamilton*, 158 Pa. St. 107; 27 Atl. 836; *Cobb v. Hall*, 33 Vt. 233; *Pancake v. Campbell*, 44 W. Va. 82; 28 S. E. 719; *Davis v. Grand Rapids Co.*, 41 W. Va. 717; 24 S. E. 630.

² *Frost v. Knight*, L. R. 7 Exch.

111; *Holloway v. Griffith*, 32 Ia. 409; 7 Am. Rep. 208; *Trammel v. Vaughan*, 158 Mo. 214; 81 Am. St. Rep. 302; 51 L. R. A. 854; 59 S. W. 79; *Burtis v. Thompson*, 42 N. Y. 246; 1 Am. Rep. 516.

³ *Brown v. Odill*, 104 Tenn. 250; 78 Am. St. Rep. 914; 56 S. W. 840.

⁴ *Hochster v. De la Tour*, 2 El. & Bl. 678.

⁵ *Roehm v. Horst*, 178 U. S. 1; *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140; 94 Am. St. Rep. 112; 59 L. R. A. 122; 42 S. E. 378; *Roebeling v. Fence*, 130 Ill. 660; 22 N. E. 518; *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536; 17 Am. St. Rep. 788; 18 Atl. 1058.

⁶ *Roehm v. Horst*, 178 U. S. 1; *affirming*, 91 Fed. 345; 33 C. C. A. 550.

⁷ *Northrop v. Deposit Co.*, 119 Fed. 969.

for damages thereon. So a contract whereby A agrees to hold certain property for life, with remainder in trust to B, is broken during A's lifetime by renunciation of B's contract so that B can maintain an action thereon at once.⁸ Such renunciation may entitle the adversary party to a cancellation of the contract in equity.⁹ In other jurisdictions it is said that renunciation before performance is due does not amount to breach, but that if such renunciation is not withdrawn when performance is due breach exists.¹⁰ The doctrine of breach by renunciation before performance is due, as applying to contracts of sale, is repudiated in some jurisdictions. Thus it has been held that renunciation before performance cannot operate as a breach of a contract to sell corn,¹¹ or to purchase flax,¹² or to sell¹³ or buy realty.¹⁴ A contract by which one agrees to adopt another and make him his heir has been held not to be broken during the promisor's lifetime, by his declaration that he does not intend to carry the contract out, as he may yet conclude to do so.¹⁵ A contract to pay money at a future time is not within the doctrine of renunciation. If the debtor recognizes his liability under the contract and declares that he will not pay the debt, the creditor has no right of action before the time fixed by the contract for such payment. While there is little direct adjudication on this point, courts which have treated renunciation before performance is due as giving the party not in default a right to treat such renunciation as an immediate breach, and to sue for damages at once, have been careful to indicate that this rule does not apply to money contracts pure and simple.¹⁶ Courts which

⁸ *Schmitt v. Schnell*, 14 Ohio C. C. 153; 7 Ohio C. D. 657.

⁹ Contract for the sale of land. *Holingreen v. Piete*, 50 Minn. 27; 52 N. W. 266.

¹⁰ *Hixson Map Co. v. Post Co.* (Neb.), 98 N. W. 872.

¹¹ *Carstens v. McDonald*, 38 Neb. 858; 57 N. W. 757.

¹² *Stanford v. McGill*, 6 N. D. 536; 38 L. R. A. 760; 72 N. W. 938.

¹³ *King v. Waterman*, 55 Neb. 324; 75 N. W. 830.

¹⁴ *Daniels v. Newton*, 114 Mass. 530; 19 Am. Rep. 384.

¹⁵ *Pittman v. Pittman*, 110 Ky. 306; 61 S. W. 461.

¹⁶ "In the case of an ordinary money contract, such as a promissory note or bond, the consideration has passed; there are no mutual obligations, and cases of that sort do not fall within the reason of the

have refused to recognize the doctrine of breach by anticipation have often placed their refusal on the ground that if such rule was to be recognized at all it must be applied to contracts for the payment of money, pure and simple, a result which it was assumed would be absurd.¹⁷ However, on breach of a contract to execute a note payable in the future an action may be maintained before such note would have come due had it been given as agreed upon.¹⁸

§1438. Adversary has right of election.

In jurisdictions where renunciation before performance is due is considered as a breach, it is a breach and discharge only if the adversary party elects to treat it so.¹ The adversary party has the election between treating such renunciation as a breach or disregarding it as inoperative and waiting until the time fixed by the contract for performance, in order to give the party who has renounced the contract an opportunity to comply with its terms and perform according to his agreement.² Thus A had agreed to sell to B from three hundred tons to five hundred tons at B's option, and A on delivering three hundred tons ordered by B notified B that he would deliver no more. It was held that B could ignore such notice, demand two hundred tons more and sue A for non-delivery.³ If the party not in default elects to treat the contract as still in force, he cannot excuse a subsequent breach on his part. Thus A, the owner of an opera-house, had a contract with B, a manager of a theatrical

rule. . . . We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods." *Roehm v. Horst*, 178 U. S. 1, 17, 18. To the same effect see *obiters* in *Nichols v. Steel Co.*, 137 N. Y. 471; 33 N. E. 561.

¹⁷ *Greenway v. Gaither*, Taney (U. S. C. C.) 227; *Daniels v. New-*

ton, 114 Mass. 530; 19 Am. Rep. 384.

¹⁸ *American Mfg. Co. v. Klarquist*, 47 Minn. 344; 50 N. W. 243.

¹ *Smith v. Banking Co.*, 113 Ga. 975; 39 S. E. 410; *Dambmann v. Lorentz*, 70 Md. 380; 14 Am. St. Rep. 364; 17 Atl. 389.

² *Dambmann v. Lorentz*, 70 Md. 380; 14 Am. St. Rep. 364; 17 Atl. 389.

³ *Dambmann v. Lorentz*, 70 Md. 380; 14 Am. St. Rep. 364; 17 Atl. 389.

company, by which A was to furnish his opera-house and B was to take a certain percentage of the receipts. B subsequently submitted to A a new "contract" giving B a larger percentage of the receipts, B stating that he could not think of playing for less. A returned the new "contract" unaccepted, claiming to have a contract with B. A was thereupon bound to furnish the opera-house in accordance with the original contract.⁴ Some authorities hold that this election to treat such renunciation as a breach must be made promptly if at all.⁵ At any rate, delay for a time agreed upon by the adversary party to decide whether he will accept a new contract is not a modification or waiver of rights under the old.⁶ He may, however, at any time before the party who has renounced the contract withdraws his renunciation, elect to treat it as a breach, even if he has at first refused to consider it as a breach, and has demanded performance.⁷ This right of election exists only so far as it is consistent with the rule that the party not in default must do nothing after default to increase damages. After notice of renunciation the adversary party who has not yet performed and is not in default cannot proceed with performance and recover from the party who has renounced the contract, the entire contract price.⁸ His right of recovery in such cases is measured by the damages caused him by such renunciation, the contract being for this purpose considered as broken at the time of the renunciation. Thus where A agreed with B to erect a creamery⁹ or a cheese and butter factory¹⁰ and before A has done any work B renounces the contract, A cannot proceed to construct the factory and then recover the entire contract price from B. The party so renouncing cannot, after such renunciation has been accepted by the adversary party as a discharge, treat the contract as still

⁴ *Bernstein v. Meech*, 130 N. Y. 354; 29 N. E. 255. 22 L. R. A. 80; 53 N. W. 756; *Davis v. Bronson*, 2 N. D. 300; 33 Am. St. Rep. 783; 16 L. R. A. 655; 50 N. W. 836.

⁵ *Kilgore v. Society*, 90 Tex. 139; 37 S. W. 598. ⁹ *Davis v. Bronson*, 2 N. D. 300; 33 Am. St. Rep. 783; 16 L. R. A. 655; 50 N. W. 836.

⁶ *Goodsell v. Telegraph Co.*, 130 N. Y. 430; 29 N. E. 969. ¹⁰ *Gibbons v. Bente*, 51 Minn. 499; 22 L. R. A. 80; 53 N. W. 756.

⁷ *Ault v. Dustin*, 100 Tenn. 366; 45 S. W. 981.

⁸ *Gibbons v. Bente*, 51 Minn. 499; 22 L. R. A. 80; 53 N. W. 756.

in force.¹¹ Formal surrender of the written contract is unnecessary.¹² Thus a contract of sale provided for delivery in installments, the vendee to give his notes, payable at a future day, as each installment was delivered. Before the contract was completely performed the vendee refused to give his notes. The vendor was allowed to bring an action at once before the expiration of the time fixed for the credit, and the vendee cannot then insist on such term of credit.¹³

§1439. What constitutes renunciation.

Where the doctrine of breach by renunciation is recognized by the courts, the question of what amounts to renunciation is material. A specific refusal to perform or to have anything more to do with the contract is a breach by renunciation.¹ To operate as a breach by renunciation, however, the party who renounces the contract must do so by a distinct, unequivocal and absolute refusal to perform the contract or to recognize it as binding upon him.² If A is bound by a contract with B to deliver ice to B at some time during the season, letters written by A arguing against the propriety of B's insisting upon performance at a time when the market price of ice was so much higher than it was when A had received ice from B, in exchange for which this ice was demanded, and requesting a personal interview, do not amount to a renunciation.³ A letter written by an agent of a corporation, who has made a contract on its behalf, referring to it as a quasi agreement by the corporation, quoting the resolution under which he is acting, questioning his authority under such resolution to make the agreement and suggesting that the adversary party await further action of the board of directors of the corporation before proceeding, is not renuncia-

¹¹ *South Boulder, etc., Co. v. Marfell*, 15 Colo. 302; 25 Pac. 504; *Morton v. Nelson*, 145 Ill. 586; 32 N. E. 916.

¹² *South Boulder, etc., Co. v. Marfell*, 15 Colo. 302; 25 Pac. 504.

¹³ *Nichols v. Steel Co.*, 137 N. Y. 471; 33 N. E. 561.

¹ *Wallingford v. Aitkins* (Ky.), 72 S. W. 794.

² *Hartnett v. Baker*, — Del. —; 56 Atl. 672.

³ *Dingley v. Oler*, 117 U. S. 490.

tion.⁴ If a life insurance company makes illegal assessments, but does nothing further to repudiate liability under the contract, this is not breach by renunciation.⁵ To amount to renunciation the declaration of the party renouncing must refer to the present time, and must show that he does not look upon it as binding him. His statement while performing in good faith that he intends to abandon at some time in the future does not amount to breach by renunciation.⁶ If one party to the contract claims as contract rights thereunder more than he is given by the contract, such claim does not of itself amount to a renunciation of the contract.⁷ Thus the principal's claiming that the agent under a contract for buying cotton should furnish the principal with an invoice and further description of the cotton, as well as the samples stipulated for in the contract, is not renunciation.⁸ Thus if one party claims by virtue of the contract a right to forfeit it under existing conditions, his ineffectual attempt to declare such forfeiture is not a renunciation.⁹ If he does not refuse performance at the proper time the adversary party cannot treat the contract as avoided. So an attempt to get a favorable modification of a contract is not a renunciation thereof.¹⁰ If the renunciation alleged consists of words and conduct of the parties about which there is a dispute of fact, the question of renunciation is for the jury.¹¹

§1440. Attempted modification by one party is breach.

As has already been stated, a prior valid contract cannot be abrogated or modified by an alleged new contract unless both parties assent thereto.¹ If one party manifests his intention in unequivocal language not to perform the contract unless modi-

⁴ Pinchback v. Mining Co., 117 N. C. 484; 23 S. E. 425.

⁵ Lee v. Association, 97 Va. 160; 33 S. E. 556.

⁶ Kilgore v. Educational Society, 90 Tex. 139; 37 S. W. 598.

⁷ Lundahl v. Hansen, 147 Ill. 504; 35 N. E. 741; Emack v. Hughes, 74 Vt. 382; 52 Atl. 1061.

⁸ Bell v. Maximos, 85 Tex. 140; 19 S. W. 1070.

⁹ Lundahl v. Hansen, 147 Ill. 504; 35 N. E. 741.

¹⁰ Bernstein v. Meech, 130 N. Y. 354; 29 N. E. 255.

¹¹ Gunther v. Gunther, 181 Mass. 217; 63 N. E. 402.

¹ See Ch. LXII.

fied, this may amount to a breach,² but it cannot relieve him from liability under his contract. If one person gives notice that he will not perform at all,³ or that he will not perform unless new terms which he specifies are made part of the contract,⁴ such conduct is a breach, but does not operate as a new contract. Thus if A has agreed to construct an ice-plant and refuses to complete it unless the adversary party will waive a claim for damages, such refusal is a breach.⁵

§1441. Damages in case of breach by renunciation.

If a contract is broken by renunciation before performance is due, the adversary party may recover damages occasioned by such breach, but he cannot without performance recover upon the contract as if he had performed the same.¹ Thus under a contract giving to A the option to sell a certain business for twenty-five thousand dollars or more, his commission to be whatever he sells it for in excess of twenty-five thousand dollars, A cannot recover from the vendor as if he had performed where the vendor refuses to allow him to perform.² This view does not affect A's right of action, but merely the measure of his damages.³ So if A repudiates a contract whereby he has agreed to pay for scales which B is to build on A's premises, B cannot thereafter forward such scales and recover the contract price.⁴

² *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140; 94 Am. St. Rep. 112; 59 L. R. A. 122; 42 S. E. 378; *Davis v. Campbell*, 93 Ia. 524; 61 N. W. 1053; *Guild v. Ry.*, 57 Kan. 70; 57 Am. St. Rep. 312; 33 L. R. A. 77; 45 Pac. 82; *Martin v. Meles*, 179 Mass. 114; 60 N. E. 397.

³ *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140; 94 Am. St. Rep. 112; 59 L. R. A. 122; 42 S. E. 378.

⁴ *Johnson Forge Co. v. Leonard*, 3 Penne. (Del.) 342; 94 Am. St. Rep. 86; 51 Atl. 305; *Stephenson v. Cady*, 117 Mass. 6; *Blackburn v. Reilly*, 47 N. J. L. 290; 54 Am. Rep. 159; 1 Atl. 27.

⁵ *Bryson v. McCone*, 121 Cal. 153; 53 Pac. 637.

¹ *Thompson v. Kyle*, 39 Fla. 582; 63 Am. St. Rep. 193; 23 So. 12. See Ch. LXXIII.

² *Thompson v. Kyle*, 39 Fla. 582; 63 Am. St. Rep. 193; 23 So. 12.

³ For cases taking a different view of the measure of damages see *McAlister v. Safley*, 65 Ia. 719; 23 N. W. 139; *Durkee v. Gunn*, 41 Kan. 496; 13 Am. St. Rep. 300; 21 Pac. 637.

⁴ *Moline Scale Co. v. Beed*, 52 Ia. 307; 35 Am. Rep. 272; 3 N. W. 96. (B has not performed the contract as he has not built the scales.)

III. RENUNCIATION WHEN PERFORMANCE IS DUE.

§1442. Renunciation when performance is due.

If a party to a contract repudiates liability under it when the time for performance on his part has arrived or while the other party is performing his part of the contract a breach exists.¹ Repudiation of a contract between a partnership and another, if made by one of the partners, discharges the contract.² If the adversary party has already done everything to be done by him under the terms of the contract, a right of action exists in his favor at once.³ If he has not performed, such breach gives a right of action to the adversary party at once, though he has not performed the covenants of the contract on his part to be performed.⁴ Breach by renunciation during performance excuses further performance by the adversary party as a condition precedent to recovery on his part.⁵ Such breach also excuses performance of other acts which by the terms of the contract would have been conditions precedent, which would have to be performed before performance by the adversary party could be required.⁶ Thus further demand is not necessary to put the party breaking the contract in default even if such demand and tender of performance would otherwise be a covenant concurrent with the covenants of the party breaking the contract.⁷ Thus under a contract to repurchase certain notes on thirty days' notice, refusal to take such notes when notice is given excuses tender at the end of thirty days.⁸ So a notice by a railroad company which has agreed to furnish cars that it will not furnish such cars excuses further demand

¹ Anvil Mining Co. v. Humble, 153 U. S. 540; Edward Hines Lumber Co. v. Alley, 73 Fed. 603; Dobbling v. Ry., 207 Pa. St. 123; 56 Atl. 349.

² Bryson v. McCone, 121 Cal. 153; 53 Pac. 637; Gross v. Lewis, 54 W. Va. 433; 46 S. E. 174.

³ Hand v. Power Co., 167 N. Y. 142; 60 N. E. 425.

⁴ Thompson v. Brown, 106 Ia. 367; 76 N. W. 819; Chapman v.

Ry., 146 Mo. 481; 48 S. W. 646.

⁵ See § 1437. McElwee v. Improvement Co., 54 Fed. 627.

⁶ Anderson v. McDonald, 31 Wash. 274; 71 Pac. 1037.

⁷ Loeb v. Stern, 198 Ill. 371; 64 N. E. 1043; Bigelow v. Ry., 104 Wis. 109; 80 N. W. 95.

⁸ Loeb v. Stern, 198 Ill. 371; 64 N. E. 1043.

therefor.⁹ So refusal by one who has agreed to furnish logs to be sawed at a specified price excuses further performance or tender. The fact that the adversary party thereafter sells his mill does not prevent him from recovering damages.¹⁰ So a repudiation of a building contract excuses the contractor from the obligation of procuring or attempting to procure the certificate of the engineer as a condition precedent to payment,¹¹ or from reference to arbitration.¹² So abandonment of a building contract by the contractor excuses the owner from complying with a clause which requires, as a condition precedent to his taking possession of the building a written certificate of the architect that the contractor is not doing the work satisfactorily, and three days' notice to the contractor.¹³ So refusal by one who has hired a special train to take it unless the carrier will guarantee arrival at a specified time discharges the carrier for all liability if it repays the money paid under the contract.¹⁴ Thus if a contractor who has partly performed a contract to remodel an old building refuses to complete it, a right of action in favor of the owner exists at once.¹⁵ So one who has agreed to support another and during performance refuses to furnish support any longer,¹⁶ or refuses to furnish support at a reasonable place selected by the obligee, if the latter has the right to select such place,¹⁷ breaks such contract and is liable for damages. So a breach exists if he repudiates the obligation of such contract, even if he offers to support the grantor as a matter of charity.¹⁸ One who has employed another for a specified time breaks such contract if he discharges such employe without cause during such time, and the employe may sue at once for

⁹ Bigelow v. Ry., 104 Wis. 109; 80 N. W. 95.

¹⁰ Dunn v. Johnson, 33 Ind. 54; 5 Am. Rep. 177.

¹¹ Smith v. Wetmore, 167 N. Y. 234; 60 N. E. 419.

¹² Munk v. Kanzler, 26 Ind. App. 105; 58 N. E. 543.

¹³ George A. Fuller Co. v. Doyle, 87 Fed. 687.

¹⁴ Wilcox v. Ry., 52 Fed. 264; 17 L. R. A. 804; 3 C. C. A. 73.

¹⁵ Chapman v. Beltz, 48 W. Va. 1; 35 S. E. 1013.

¹⁶ Parker v. Russell, 133 Mass. 74; Schell v. Plumb, 55 N. Y. 592.

¹⁷ Tuttle v. Burgett, 53 O. S. 498; 53 Am. St. Rep. 649; 30 L. R. A. 214; 42 N. E. 427.

¹⁸ Walker v. Walker, 104 Ia. 505; 73 N. W. 1073.

damages for the entire contract.¹⁹ If A accepts employment under a contract to work for one year as employe, and then to be received into partnership for one year, and he is discharged without cause during the first year, A may at once sue for breach of the entire contract.²⁰ It is not necessary for the employe to tender services further or to remain in readiness to perform.²¹ In cases of breach during performance it is no defense that the work done under the contract has been of no benefit to the party in default.²² Conduct relied upon as renunciation must be unequivocal.²³ Thus conduct induced by the belief that the adversary party has himself abandoned the contract cannot be treated as renunciation.²⁴ Renunciation does not exist because of a request for a modification or rescission²⁵ of the contract. To constitute discharge the renunciation must go to the entire contract. A refusal to perform one of several covenants, and one not the vital feature of the contract, is not discharge.²⁶ The party in default cannot, after renunciation during performance, which has been treated by the adversary party as a breach amounting to a discharge, elect to treat the contract as still in force.²⁷

IV. VOLUNTARY CREATION OF IMPOSSIBILITY.

§1443. Voluntary disability to perform.

One of the parties to a contract may voluntarily disable himself from performing, so that performance on his part becomes impossible. Such conduct amounts to breach of the

¹⁹ *Pierce v. R. R.*, 173 U. S. 1; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *East Tennessee, etc., R. R. v. Staub*, 7 Lea (Tenn.) 397; *Stubbe v. Waldeck*, 78 Wis. 437; 47 N. W. 833. For other cases on this point see §§ 1353, 1585.

²⁰ *Dugan v. Anderson*, 36 Md. 567; 11 Am. Rep. 509.

²¹ *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285.

²² *Thompson v. Brown*, 106 Ia. 367; 76 N. W. 819.

²³ *Houghton v. Callahan*, 3 Wash. 158; 28 Pac. 377.

²⁴ *Newton v. Van Dusen*, 47 Minn. 437; 50 N. W. 820.

²⁵ *McGregor v. Ross*, 96 Mich. 103; 55 N. W. 658.

²⁶ *Central Appalachian Co. v. Buchanan*, 73 Fed. 1006; *Grunwald v. Hahn*, 176 Pa. St. 37; 34 Atl. 972.

²⁷ *Cochran v. Yoho*, 34 Wash. 238; 75 Pac. 815.

contract.¹ If A agrees to mine coal on B's land, paying a specified royalty to B on the amount mined, such royalty not to be less than a specified minimum sum annually, A impliedly agrees to do nothing to incapacitate himself from mining all the coal on B's land that can profitably be mined. Accordingly if A mines a lower vein first, so that it is impossible for A to mine the upper veins thereafter, this is a breach. A is liable in actual damages, and it has been held that he cannot escape liability by paying the minimum royalty.² So if A agrees with B to operate a certain mill for five years, A's sale of such mill to X, without requiring X to perform such agreement is a breach.³ If an insurance company terminates its business and transfers its policies and assets to another company, the insured may treat this as a breach and recover whatever he may be entitled to out of the assets.⁴ In case of voluntary disability to perform the adversary party may treat such act as discharging him from further liability under the contract.⁵ Thus A agreed to pay to B seventy-five dollars in goods. A made an assignment for the benefit of creditors. This was held to disable A from performance, so that B, without demand, could set off such amount against a debt due from him to A.⁶ Some courts hold that he may treat the contract as in force, if a continuing contract, and sue for installments as they become due thereunder. Thus under a contract whereby A agrees to pay B royalties, if A makes it impossible for himself to perform, B may treat such act as an entire breach and sue for damages; or he may treat the contract as in force and sue for the installments as they become due.⁷ He may bring action at once, even if the time for performance has not

¹ *Planché v. Colburn*, 8 Bing. 14; *Palmer v. Temple*, 9 Ad. & El. 508; *Lovell v. Ins. Co.*, 111 U. S. 264; *Eames v. Savage*, 14 Mass. 425; *Stark v. Duvall*, 7 Okla. 213; 54 Pac. 453.

² *Genet v. Canal Co.*, 136 N. Y. 593; 19 L. R. A. 127; 32 N. E. 1078.

³ *Hudson v. Archer*, 9 S. D. 240; 68 N. W. 541.

⁴ *Lovell v. Ins. Co.*, 111 U. S. 264.

⁵ *Day v. Jeffords*, 102 Ga. 714; 29 S. W. 591.

⁶ *Laybourn v. Seymour*, 53 Minn. 105; 39 Am. St. Rep. 579; 54 N. W. 941.

⁷ *Keck v. Bieber*, 148 Pa. St. 645; 33 Am. St. Rep. 846; 24 Atl. 170.

yet arrived.⁸ The party who has made performance impossible cannot discharge himself thereby from liability under the contract.⁹ Thus one who agrees to buy all the ice necessary for his business cannot discharge his own liability by selling his business.¹⁰ So one who agrees to buy all the coal necessary for three specified steamships for one year, cannot discharge his liability by selling one of these steamships.¹¹ If A agrees to devise,¹² or to sell,¹³ or to deliver as payment of a debt,¹⁴ specific property to B, A's sale of such property is a breach of such contract, and gives to B the right to sue upon such contract before the time fixed for performance. So A's contract to employ B to sell specific realty,¹⁵ is discharged by A's conveying such realty to another. It has been held, however, that if A, after agreeing to convey specific realty to B, conveys it to X who knows of B's contract, B can enforce the contract as against X and therefore cannot treat such sale as a discharge.¹⁶ This is especially true if the conveyance to X is expressly made subject to B's rights.¹⁷ If, however, A has agreed to sell to B property which is not specific, but is to correspond to a given description, and thereafter A without B's assent selects certain articles intending to deliver them in performance of such contract, his selection of such articles is not conclusive and his subsequent sale of them is therefore not a discharge.¹⁸

⁸ *Stark v. Duvall*, 7 Okla. 213; 54 Pac. 453; *Keck v. Bieber*, 148 Pa. St. 645; 33 Am. St. Rep. 846; 24 Atl. 170.

⁹ *Hickey v. O'Brien*, 123 Mich. 611; 81 Am. St. Rep. 527; 49 L. R. A. 594; 82 N. W. 241.

¹⁰ *Hickey v. O'Brien*, 123 Mich. 611; 81 Am. St. Rep. 227; 49 L. R. A. 594; 82 N. W. 241.

¹¹ *Wells v. Alexandre*, 130 N. Y. 642; 15 L. R. A. 218; 29 N. E. 142.

¹² *Synge v. Synge* (1894), 1 Q. B. 466.

¹³ *Weaver v. Aitcheson*, 65 Mich. 285; 32 N. W. 436

¹⁴ *Reynolds v. Trust Co.*, 83 Fed. 593; 27 C. C. A. 620.

¹⁵ *Brooks v. Miller*, 103 Ga. 712; 30 S. E. 630.

¹⁶ *Kreibich v. Martz*, 119 Mich. 343; 78 N. W. 124.

¹⁷ *Fields v. Clayton*, 117 Ala. 538; 67 Am. St. Rep. 189; 23 So. 530.

¹⁸ *Stanford v. McGill*, 6 N. D. 536; 38 L. R. A. 760; 72 N. W. 938.

§1444. Prevention of performance by adversary party.

One party to a contract may make it impossible for the other party to perform the contract or may delay the performance of it. The party who thus makes performance impossible on the part of the other, does not thereby discharge himself from liability.¹ Thus, if A sells to B property which is to meet the requirements of a certain test, B cannot prevent liability by making the performance of such test impossible.² Thus, where A agreed to furnish air-propellers to remove the smoke from B's tempering-room, B to furnish the power from a shaft in such room, and the machine to be subject to thirty days' successful trial, it was held that the fact that the shaft broke, and that B declined to furnish a new shaft, prevented thirty days' successful trial, and left B liable to A for the contract price.³ So, though no test was provided for, A who furnishes piping to carry off shavings and dust from certain machinery and places an exhaust fan furnished by B, can recover although, owing to a defect in the fan, the result is not successful.⁴ A sold a horse to B for an agreed price, and B was to pay one hundred dollars more if on a speed trial within ninety days such horse trotted as fast as another specified horse. B declined to make such test, because the horses were not in proper condition for the test within ninety days, and he did not allow such test to be made afterwards. It was held, that on proof of the fact that the horse sold was as fast as the other, A could recover the extra one hundred dollars.⁵ A floating dock, which is to be tested by means of a suitable vessel furnished by the gov-

¹ Blodgett v. Zinc Co., 120 Fed. 893; Great Falls v. Theis, 79 Fed. 943; Brewer v. McCain, 21 Colo. 382; 41 Pac. 822; Christopher, etc., Co. v. Yeager, 202 Ill. 486; 67 N. E. 166; Shirk v. Lingeman, 26 Ind. App. 630; 59 N. E. 941; Loftus v. Riley, 83 Ia. 503; 50 N. W. 17; Howard v. Mfg. Co., 162 N. Y. 347; 56 N. E. 986; Vanderhoof v. Shell, 42 Or. 578; 72 Pac. 126; Bishop v. Averill, 17 Wash.

209; 49 Pac. 237; 50 Pac. 1024.

² Deyo v. Hammond, 102 Mich. 122; 25 L. R. A. 719; 60 N. W. 455; Howard v. Mfg. Co., 162 N. Y. 347; 56 N. E. 986.

³ Howard v. Mfg. Co., 162 N. Y. 347; 56 N. E. 986.

⁴ May Mantel Co. v. Blow-Pipe Co., 93 Ga. 778; 21 S. E. 142.

⁵ Deyo v. Hammond, 102 Mich. 122; 25 L. R. A. 719; 60 N. W. 455.

ernment within two months after the dock is completed, need not be tested if the government does not furnish a suitable vessel for such test, and the builder may recover the contract price to become due when such test was made, without making such test.⁶ A sold a heating plant to B under a contract by which A was to have a year to remedy any defects. Before the expiration of the year B removed the plant. It was held that A could recover the entire contract price.⁷ If the vendee agrees to measure property in a certain way before payment is due, and then makes such measurement impossible, the vendor may recover upon proof of the quantity furnished.⁸ Thus A agreed to furnish to a city stone to be crushed, which after crushing was to be used to macadamize certain streets, and the stone was to be measured upon the streets when finished. A furnished such stone, and it was crushed; but the city did not place it upon the streets. The city was not thereby discharged from liability.⁹ So under a contract for removing tar which provides that A's suspension of work for ten days shall give to B the right to terminate the contract, A suspended work for nine days; on the tenth day A was ready to resume, but B had given his employes a holiday and there was no one to do the weighing provided for by the contract. These facts were held not to justify B in terminating the contract.¹⁰ Demanding performance in an illegal manner is equivalent to making performance impossible.¹¹ The party who makes performance impossible cannot recover damages from the adversary party for not performing.¹² So under a contract to furnish support at the obligor's home, no recovery can be had if the obligee leaves

⁶ *International, etc., Co. v. United States*, 60 Fed. 523.

⁷ *Lehmann v. Webster*, 209 Ill. 264; 70 N. E. 600; affirming, 110 Ill. App. 298.

⁸ *Harper v. Sterling*, 84 Ill. App. 62.

⁹ *Harper v. Sterling*, 84 Ill. App. 62.

¹⁰ *Brown v. Monumental Co.*, — Md. —; 55 Atl. 391.

¹¹ *Hunt v. Adams*, 81 Me. 356; 3 L. R. A. 608; 17 Atl. 298. (Demanding ordinary labor on Sunday excuses employee for abandoning employment.)

¹² *District of Columbia v. Iron Works*, 181 U. S. 453; *Chicago, etc., Ry. v. Hoyt*, 149 U. S. 1; *Antonelle v. Lumber Co.*, 140 Cal. 309; 73 Pac. 966; *Day v. Jeffords*, 102 Ga. 714; 29 S. E. 591.

without good cause and without demanding support elsewhere.¹³ On the other hand, if the obligor breaks up housekeeping and goes to live with a relative and cannot furnish a home, breach exists, even if the obligee is asked to remain until the crops are removed.¹⁴ To operate as a discharge it is not necessary that the party who makes performance by the other impossible, should take active steps thereto. It is sufficient if he omits to do something which he should do, and such omission causes the impossibility.¹⁵ A agreed to furnish certain materials to B for a building in which B was the main contractor, the material to be paid for after it was accepted by the supervising architect. A shipped a car-load of material, which was seized under a writ of attachment issued against B before it was placed in the building. It was held that A could recover, though such material was never accepted by the supervising architect.¹⁶ Thus omitting to secure a right of way which thereby falls into the hands of a competing railroad and makes the construction of the extension agreed upon impracticable, discharges one who has agreed to advance money for such extension.¹⁷ So a delay caused by plumbers, working under an independent contract with the owner of a building cannot authorize a deduction from the contract price, provided for in the contract on account of default of the contractor.¹⁸ Under a principle analogous to the doctrine of voluntary creation of impossibility of performance, it has been held that if a beneficiary under an insurance policy kills the insured, he forfeits his rights under the insurance policy and it should be paid to the insured's estate.¹⁹ The assignee of the beneficiary's interest under the policy can claim no interest thereunder.²⁰ So it has been held that a

¹³ *Adams v. Cook*, 200 Pa. St. 258; 49 Atl. 954.

¹⁴ *Milks v. Milks*, 129 Mich. 164; 88 N. W. 402.

¹⁵ *United States v. Jack*, 124 Mich. 210; 82 N. W. 1049.

¹⁶ *United States v. Jack*, 124 Mich. 210; 82 N. W. 1049. For a case presenting similar facts see *Leek Milling Co. v. Langford*, 81 Miss. 728; 33 So. 492.

¹⁷ *Porter v. Blair*, 83 Fed. 104.

¹⁸ *Crouch v. Gutmann*, 134 N. Y. 45; 30 Am. St. Rep. 608; 31 N. E. 271.

¹⁹ *Schmidt v. Life Association*, 112 Ia. 41; 84 Am. St. Rep. 323; 51 L. R. A. 141; 83 N. W. 800.

²⁰ *Schmidt v. Life Association*, 112 Ia. 41; 84 Am. St. Rep. 323; 51 L. R. A. 141; 83 N. W. 800.

policy payable to insured's estate is forfeited where he is executed for murder under sentence of a court of competent jurisdiction.²¹ In order that the case may come within the principles discussed in this section, however, the conduct of the party who is said to prevent performance must be in excess of his legal rights. Employment by an owner of a non-union laborer, because of whom the contractor's workmen struck, does not amount to the owner's preventing the contractor from performing his contract.²² Furthermore it must be conduct which in legal effect interferes with performance by the adversary party. Profane and insulting language²³ or threats of personal violence²⁴ do not make performance impossible and cannot be treated as discharging the contract.

§1445. Illustration of building contracts.

A common illustration of the doctrine, that one who makes performance by the other impossible, or delays it, thereby discharges the contract, or excuses delay, is found in building contracts. If the owner by his own acts delays the contractor in completing the building, the owner cannot recover damages, nor can he enforce a covenant for paying liquidated damages in case of delay.¹ If the contractor has himself suffered damages by reason of the delay, he may recover such damages from the owner.² Thus, a delay caused by the failure of the owner's

²¹ *Burt v. Ins. Co.*, 181 U. S. 617; affirming without report, 105 Fed. 419; 44 C. C. A. 548; 59 L. R. A. 393.

²² *Serber v. McLaughlin*, 97 Ill. App. 104.

²³ Used by one drilling a well under contract. *Thompson v. Brown*, 106 Ia. 367; 76 N. W. 819.

²⁴ Made by a vendor of realty under an executory contract of sale, to the vendee in possession, thereby he gave up possession and brought suit for the value of improvements. *Cole v. Alexan-*

der, 113 Ga. 1154; 39 S. E. 477.

¹ *Wyandotte, etc., Ry. v. Bridge Co.*, 100 Fed. 197; 40 C. C. A. 325; *King, etc., Mfg. Co. v. St. Louis*, 43 Fed. 768; 10 L. R. A. 826; *Blymer Ice Machine Co. v. McDonald*, 48 La. Ann. 439; 19 So. 459; *Davis v. Light Co.*, 57 Minn. 402; 47 Am. St. Rep. 622; 59 N. W. 482; *Murphy v. Orne*, 185 Pa. St. 250; 39 Atl. 959.

² *Langford v. United States*, 95 Fed. 933; *Atlantic, etc., Ry. v. Construction Co.*, 98 Va. 503; 37 S. E. 13.

architects to furnish plans and specifications,³ or by the owner's delay,⁴ or refusal⁵ to furnish necessary levels, or by the failure of the owner to furnish materials agreed to be furnished;⁶ or to do the masonry work agreed upon,⁷ or to construct a foundation,⁸ or piers,⁹ or metal work,¹⁰ or roof timbers,¹¹ agreed to be constructed by the owner and necessary to be constructed before the contractor can proceed with his work cannot make the contractor liable to the owner, either for actual damages or under a clause providing for liquidated damages. So, a contractor is not liable for damages for delay caused by failure of the owner to furnish a right of way,¹² or to construct a road over which the contractor is to haul material.¹³ Conversely, an owner who has to do certain work upon the house himself, may recover from the contractor, although he has not done such work, where the contractor delayed performance and kept control of the house, and the work to be done by the owner could not well be done until the contractor had completed his work.¹⁴ So the contractor is not liable for damage caused by the owner's furnishing defective plans, thereby making certain repairs and changes necessary.¹⁵ So delay in inspection provided for by the contract and necessary before the contractor can proceed discharges him from liability for delay.¹⁶ So if a building is to be paid for when the owner is satisfied that no

³ Mahoney v. Church, 47 La. Ann. 1064; 17 So. 484. So under a contract to construct machinery according to plans, which were not furnished in time. Jeffrey Mfg. Co. v. Iron Co., 93 Fed. 408.

⁴ Boden v. Maher, 105 Wis. 539; 81 N. W. 661.

⁵ Olson v. Ry., 22 Wash. 139; 60 Pac. 156.

⁶ Davis v. Light Co., 57 Minn. 402; 47 Am. St. Rep. 622; 59 N. W. 482.

⁷ Underwood v. Wolf, 131 Ill. 425; 19 Am. St. Rep. 40; 23 N. E. 598.

⁸ Standard Gaslight Co. v. Wood, 61 Fed. 74

⁹ King, etc., Mfg. Co. v. St. Louis, 43 Fed. 768; 10 L. R. A. 826.

¹⁰ Langford v. United States, 95 Fed. 933.

¹¹ Vaughn v. Digman (Ky.), 43 S. W. 251.

¹² Chicago, etc., Ry. v. Clark, 92 Fed. 968; 35 C. C. A. 120.

¹³ Corbett v. Anderson, 85 Wis. 218; 54 N. W. 727.

¹⁴ Cavode v. Principal, 110 Mich. 672; 68 N. W. 987.

¹⁵ Coon v. Water Co., 152 Pa. St. 644; 25 Atl. 505.

¹⁶ Erickson v. United States, 107 Fed. 204.

liens have been placed on the property, the owner cannot withhold payment because of a lien on the property for material bought under such contract from a third person by the owner.¹⁷

§1446. Rights of party prevented from further performance.

The party prevented from performing further may recover for what he has done without performing fully.¹ A sold a monument to B, upon which were to be inscribed four lines of verse to be furnished by B. It was held that if B refused to furnish the lines of verse, A could erect the monument without the verse and recover the contract price, less the cost of inscribing such lines of verse.² A agreed to construct certain wood-work in B's building. Before it was completed the roof of the building fell, through the negligence of B's employes. A was allowed to recover for the part of the work that had been done, although it was injured by such fall.³ One who agrees to support another at the house of such other, is discharged from further liability and permitted to sue in assumpsit for work done upon demand of the owner of the house that the other leave the premises.⁴ The party preventing performance cannot recover from the other for damages for non-performance thus caused. Thus no deduction can be made from the contract price of a building for defects due to the action of the architect employed by the owner.⁵ No recovery for damages can be had for delay in delivering a chattel sold if the delay is due to the fault of the vendee.⁶ A agreed to deliver hay to the United States, and it was an implied term of the contract that he was to cut the hay in the Yellowstone Valley, where the only available grass was growing. The

¹⁷ *Vanderhoof v. Shell*, 42 Or. 578; 72 Pac. 126.

¹ *North v. Mallory*, 94 Md. 305; 51 Atl. 89; *Parker v. Macomber*, 17 R. I. 674; 16 L. R. A. 858; 24 Atl. 464; *Hildebrand v. Fine-Art Co.*, 109 Wis. 171; 53 L. R. A. 826; 85 N. W. 268.

² *Eastern Granite Co. v. Heim*, 89 Ia. 698; 57 N. W. 437.

³ *Teakle v. Moore*, 131 Mich. 427; 91 N. W. 636.

⁴ *Parker v. Macomber*, 17 R. I. 674; 16 L. R. A. 858; 24 Atl. 464.

⁵ *White v. School District*, 159 Pa. St. 201; 28 Atl. 136.

⁶ *District of Columbia v. Iron Works*, 181 U. S. 453; affirming 15 App. D. C. 198; *Maher v. Lumber Co.*, 86 Wis. 530; 57 N. W. 357.

United States then had this grass cut by others. This was held to discharge A from liability from furnishing hay.⁷ A agreed to construct a boat for B. Two months before time at which such boat was to be completed, A became insolvent, made a general assignment for the benefit of creditors, and B took possession of the boat. This was held to discharge A from liability for not completing the boat within the time specified.⁸ An agreement to pay A, who was acting as superintendent of a department of a corporation, an additional salary for the last term of his services if his contract is not renewed, is discharged when such corporation sells its business to another corporation, in which sale A takes an active part.⁹ While the party prevented from further performance can recover damages, he cannot recover the full contract price as if he had performed in full.¹⁰ He may treat the contract as broken and sue for damages. The doctrine of impossibility of performance applies where one party makes performance by the other not actually impossible but highly dangerous. A agreed to take down trusses from an exposition building at five dollars per truss. While A was working upon such contract the owners of the building removed the shafting, rafters and bracing to such an extent that part of the building fell, and two of A's employes were killed. It was held that A could abandon the contract, consider it as discharged, and recover the profit that he would have earned had he completed his contract.¹¹ If the contract could not be performed in any event, conduct by one party which would have made performance impossible had it been possible before, does not amount to an actionable breach, as no damage exists. Thus A agreed with B to pay a certain sum if B should collect a claim of A's against X in full. If

⁷ *United States v. Peck*, 102 U. S. 64.

⁸ *Vandegrift v. Engineering Co.*, 161 N. Y. 435; 48 L. R. A. 685; 55 N. E. 941.

⁹ *Woodbridge v. Pratt, etc., Co.*, 69 Conn. 304; 37 Atl. 688. After such sale was made A refused to

consent to a novation of his contract offered by the new corporation.

¹⁰ *Kentucky Union Lumber Co. v. Martin* (Ky.), 49 S. W. 191.

¹¹ *Lynch v. Sellars*, 41 La. Ann. 375; 5 L. R. A. 682; 6 So. 561.

such claim was in fact uncollectible, A's assignment of such claim did not amount to a breach.¹²

V. NON-PERFORMANCE.

§1447. Non-performance as breach.

In the types of breach thus far discussed, the party who breaks the contract has manifested his intention by word or deed to disregard the obligation of the contract, and no longer to recognize it as binding upon him. Breach may also exist where one party without repudiating the contract in any way, either omits performance, or tenders a performance which is not even a substantial performance of the obligation imposed upon him by the contract.¹ The question of what constitutes such breach turns on the answer to the questions (1) what was the party, alleged to be in default, bound under the contract to do; and (2) what has he in fact done. The first question is primarily one of construction; the second, one of fact.

§1448. Breach need not be wilful.

The existence and fact of breach are not in any way dependent upon the intention or wish of the party in default to violate the contract, or upon the amount of care and faith used by the contractor,¹ whether the breach is treated as a ground of discharge² or as giving a right of action for damages.³ So it is a breach, though not a wilful breach, for one under contract for the season to quit because a strike is ordered, and he is a union man and the strikers threaten personal violence.⁴ So the fact that the breach is due to the failure or

¹² Barsby v. Warren, 47 Neb. 275; 66 N. W. 409.

¹ See § 1448 *et seq.*

¹ Jones v. Marlborough, 70 Conn. 583; 40 Atl. 460; Cornell v. Rodabaugh, 117 Ia. 287; 94 Am. St. Rep. 298; 90 N. W. 599; Vicksburg Water Supply Co. v. Gorman, 70 Miss. 360; 11 So. 680.

² Bacon v. Green, 36 Fla. 325; 18 So. 870; Baltimore v. Schaub, 96 Md. 534; 54 Atl. 106.

³ Walsh v. Fisher, 102 Wis. 172; 72 Am. St. Rep. 865; 43 L. R. A. 810; 78 N. W. 437.

⁴ Walsh v. Fisher, 102 Wis. 172; 72 Am. St. Rep. 865; 43 L. R. A. 810; 78 N. W. 437.

inability of third persons with whom the party in default has made contracts to enable him to perform his contract does not excuse such breach.⁵ Thus default in a building contract on the part of the contractor is not excused because due to the default⁶ or inability to perform,⁷ on the part of a sub-contractor or material man. Still less is the default of a sub-contractor, material man or employe a discharge available by the chief contractor where he has not in good faith endeavored to perform his contract with them so as to induce performance on their part,⁸ as where he fails to return when he agrees, and the wages of his employes are in arrears and their supplies are not furnished.⁹ So a party to a contract binding him to be "responsible for any and all wrong use of said electrotypes" is liable for use of them, in violation of the contract by one to whom he has sold his interest in such business.¹⁰ A contract to replace defective parts of a machine¹¹ is broken where the performance is prevented by reason of a strike. The question whether the breach was wilful or not is often, however, important in determining whether the party in default may recover a reasonable compensation for work done by him under the contract.¹² To be distinguished from cases referred to in this section are cases where one party in effect only contracts to arrange with third persons to complete the performance for the benefit of the adversary party. Of such nature are the contracts of carriers, who are to carry over their own line and deliver to a connecting carrier. On doing this, they are not liable for any default of the connecting carrier.¹³ So,

⁵ Davis v. Ford, 81 Md. 333; 32 Atl. 280; Reichenbach v. Sage, 13 Wash. 364; 52 Am. St. Rep. 51; 43 Pac. 354.

⁶ Davis v. Ford, 81 Md. 333; 32 Atl. 280. (In this case, however, the contractor made no *bona fide* effort to perform his contract with the material man.)

⁷ Reichenbach v. Sage, 13 Wash. 364; 52 Am. St. Rep. 51; 43 Pac. 354. (Due to the severity of the weather.)

⁸ Davis v. Ford, 81 Md. 333; 32 Atl. 280.

⁹ Hanson v. Smith, 94 Fed. 960; 36 C. C. A. 581.

¹⁰ Meyer v. Estes, 164 Mass. 457; 32 L. R. A. 283; 41 N. E. 683.

¹¹ Puget Sound, etc., Works v. Clemmons, 32 Wash. 36; 72 Pac. 465.

¹² See § 1602.

¹³ See § 359.

a vendor was to ship "within thirty days by sail or steam at seller's option." It was held that he had performed by delivering in good faith to a vessel bound to clear in such time, though for lack of a full cargo it did not in fact do so.¹⁴ On the other hand, the fact that the transaction has resulted in loss to the party seeking relief does not establish the fact of breach.¹⁵ Thus A agreed to raft lumber for X, and A employed B to do the work under A's orders. B performed according to A's orders. The work was not completed in time to perform A's contract with X, and X recovered a judgment against A for breach. These facts gave A no right of action against B.¹⁶

§1449. Belief in future breach not discharge.

The fact that A has reasonable cause to believe, and does believe, that B will be unable to perform his part of the contract, does not of itself discharge A from performing his part.¹ Thus a contract to build a boat is not discharged by the contractor's making a general assignment for the benefit of creditors. Neither is such assignment a breach. Accordingly, if the party for whom the boat is to be built takes possession of it before the time within which it was to be completed, this is a breach on his part and he cannot have damages for non-performance.² So the fact that A doubts B's solvency does not justify A's breaking the contract.³

§1450. Breach of covenant not a vital term of contract.

It is not the breach of every covenant of a contract that may operate as a discharge of the adversary party. To have

¹⁴ *Ledon v. Havemeyer*, 121 N. Y. 179; 8 L. R. A. 245; 24 N. E. 297. 73 N. W. 70; *Hathaway v. Sabin*, 63 Vt. 527; 22 Atl. 633.

¹⁵ *Penobscot Lumbering Association v. Bussell*, 92 Me. 256; 42 Atl. 408. ² *Vandegrift v. Engineering Co.*, 161 N. Y. 435; 48 L. R. A. 685; 55 N. E. 941.

¹⁶ *Penobscot Lumbering Association v. Bussell*, 92 Me. 256; 42 Atl. 408. ³ *Jewett Publishing Co. v. Butler*, 159 Mass. 517; 22 L. R. A. 253; 34 N. E. 1087; *Southern Lumber Co. v. Supply Co.*, 89 Mo. App.

¹ *Plummer v. Kelly*, 7 N. D. 88; 141.

this effect the covenant broken must be a vital term of the contract, breach of which makes performance impracticable, and the accomplishment of the purpose of the contract impossible. Breach of a minor and subsidiary covenant may give rise to an action for damages but it cannot operate as a discharge.¹ Thus a contract to erect and maintain a mill is not discharged by the adversary party's failure to maintain it for the entire time, but an action for damages is the only remedy.² Similar results have been reached where a contract to construct waterworks is departed from in minor points and no opportunity has been given to the water company to correct them,³ where a contract to feed cattle is broken only by a failure to construct racks to save the hay, the owner having suffered no loss thereby,⁴ and where a contract to ship goods under the vendee's form of charter party is broken only by using another form of charter party which omits a clause that if the vessel is freed from wharfage during discharge of cargo, freight is to be reduced four and a half pence per ton.⁵ In all these cases the party not in default must perform and sue for damages if he has suffered any.

§1451. Contract not to compete.

A contract not to compete in business, if valid, is broken by engaging in such business at such place;¹ or by his manufacturing the medical preparation in which he has agreed not to compete, under another name, claiming it to be superior

¹ Hansen v. Storage Co., 86 Fed. 832; Withers v. Moore (Cal.), 71 Pac. 697; Lassing v. James, 107 Cal. 348; 40 Pac. 534; Lake Shore, etc., Co. v. Richards, 152 Ill. 59; 30 L. R. A. 33; 38 N. E. 773; Graves v. Gas Co., 83 Ia. 714; 50 N. W. 283; Hunter v. Holmes, 60 Minn. 496; 62 N. W. 1131; Swobe v. Electric Light Co., 39 Neb. 586; 58 N. W. 181; Gage v. Fisher, 5 N. D. 297; 31 L. R. A. 557; 65 N. W. 809.

² Hunter v. Holmes, 60 Minn. 496; 62 N. W. 1131.

³ Winfield v. Water Co., 51 Kan. 70; 32 Pac. 663.

⁴ Lassing v. James, 107 Cal. 348; 40 Pac. 534.

⁵ Withers v. Moore (Cal.), 71 Pac. 697.

¹ Nelson v. Hiatt, 38 Neb. 478; 56 N. W. 1029; Cowan v. Fairbrother, 118 N. C. 406; 54 Am. St. Rep. 733; 32 L. R. A. 829; 24 S. E. 212.

to that sold before.² To constitute such breach, the new business need not be carried on in the name of the party who has agreed not to compete. If a corporation which he has organized and in which he is a stockholder³ or a partnership of which he is a member,⁴ competes in such business, the contract is broken. So breach exists if he holds himself out as a partner in a firm, though he is not one in fact;⁵ or if he acts as managing agent,⁶ or as salesman,⁷ as in a contract not to compete as barber.⁸ A contract not to act as employe for any share of the proceeds, interest in the business or compensation based on sales is not broken by working in such business as employe on a salary.⁹ If a partnership agrees not to engage in a certain business, such contract is broken if one of its members so engages.¹⁰ A contract not to compete is not broken by engaging in a different though closely allied business;¹¹ nor by making a contract to engage in such business after the time shall expire during which he was not to compete;¹² nor by assisting his wife to start in the same business with her own money;¹³ nor by the act of unauthorized parties who sell his goods within the territory covered by the contract not to compete.¹⁴ A contract not to engage in business as long as A is in such business ends when A organizes a corporation and

² Gregory v. Spicker, 110 Cal. 150; 52 Am. St. Rep. 70; 42 Pac. 576.

³ Kramer v. Old, 119 N. C. 1; 56 Am. St. Rep. 650; 34 L. R. A. 389; 25 S. E. 813.

⁴ Borley v. McDonald, 69 Vt. 309; 38 Atl. 60.

⁵ Daniels v. Brodie, 54 Ark. 216; 11 L. R. A. 81; 15 S. W. 467.

⁶ King v. Fountain, 126 N. C. 196; 35 S. E. 427.

⁷ McCausland v. Hill, 23 Ont. App. 738. See to the same effect, in case of agent Meyers v. Merrillion, 118 Cal. 352; 50 Pac. 662.

⁸ Pohlman v. Dawson, 63 Kan. 471; 88 Am. St. Rep. 249; 54 L. R. A. 913; 65 Pac. 689.

⁹ Haley Grocery Co. v. Haley, 8 Wash. 75; 35 Pac. 595.

¹⁰ Love v. Stidham, 18 App. D. C. 306; 53 L. R. A. 397. *Contra*, Streichen v. Fehleisen, 112 Ia. 612; 84 N. W. 715; *sub nomine* Steichen v. Fehleisen, 51 L. R. A. 412.

¹¹ Breck v. Ringler, 129 N. Y. 656; 29 N. E. 833. (Contract not to engage in zinc etching not broken by engaging in electrotyping and stereotyping and occasionally buying a zinc etching.)

¹² Southland, etc., Co. v. Nelson (1898), A. C. 442.

¹³ Smith v. Hancock (1894), 2 Ch. 377.

¹⁴ Dr. Harter Medicine Co. v. Hopkins, 83 Wis. 309; 53 N. W. 501.

sells his business to it;¹⁵ but it does not end if the corporation is merely nominal, and A owns all the stock and controls the business.¹⁶ If A agrees with B not to engage in a certain business, such contract is not discharged by the fact that A and B subsequently form a partnership, the property of which is on dissolution to belong to whichever of them bids the most for it.¹⁷ A sale of the good will of a business is broken by the vendor's soliciting the business of his old customers,¹⁸ or by using the former trade name, even if it is his own.¹⁹ A contract not to compete in abstracting public records is not broken by doing the clerical work of making an uncertified and unexamined copy of another abstract.²⁰

VI. RELATION OF COVENANTS.

§1452. Relation of covenants.

Whether breach discharges the adversary party from further performance, depends upon the relation between the stipulations entered into and not performed by the other party who breaks the contract, and the stipulations entered into by the adversary party, for the discharge of which such breach is invoked. Stipulations or covenants entered into by the respective parties to the contract may be: (1) Independent of each other; or (2) Mutually dependent, one upon the other. The question of whether covenants are dependent or independent, is a question of the intention of the parties as deduced from the terms of the contract. If the parties intend that performance by each of them is in no way conditioned upon performance by the other, the covenants are independent. If the parties intend performance by one to be conditioned upon

¹⁵ *Bagby & Rivers Co. v. Rivers*, 87 Md. 400; 67 Am. St. Rep. 357; 40 L. R. A. 632; 40 Atl. 171.

¹⁶ *Ragsdale v. Nagle*, 106 Cal. 332; 39 Pac. 628.

¹⁷ *Drown v. Forrest*, 63 Vt. 557; 14 L. R. A. 80; 22 Atl. 612. For similar facts see *Scudder v. Kilfool*, 57 N. J. Eq. 171; 40 Atl. 602.

¹⁸ *Ranft v. Reimers*, 200 Ill. 386; 60 L. R. A. 291; 65 N. E. 720.

¹⁹ *Symonds v. Jones*, 82 Me. 302; 17 Am. St. Rep. 485; 8 L. R. A. 570; 19 Atl. 820; *Grow v. Seligman*, 47 Mich. 607; 41 Am. Rep. 737; 11 N. W. 404.

²⁰ *Linn County Abstract Co. v. Beechley*. — Ia. —; 99 N. W. 702.

performance by the other, the covenants are mutually dependent. Covenants which are mutually dependent may bear to each other one of two relations: (1) They may be the one precedent and the other subsequent; or (2) They may be concurrent. If the parties intend that a covenant by A is to be performed before a covenant by B is to be performed, A's covenant is precedent, and B's is subsequent; the two being mutually dependent. "Where the undertaking on one side is in terms a condition to the stipulation of the other, that is, where the contract provides for the performance of some act or the happening of some event and the obligations of the contract are made to depend on such performance or happening, the conditions are conditions precedent. The reason and sense of the contemplated transaction, as it must have been understood by the parties and is to be determined from the whole contract, determine whether this is so or not; or it may be determined from the nature of the acts to be done and the order in which they must necessarily precede and follow each other in the progress of performance."¹ If the parties intend that performance by A of the covenant entered into by him is to be made at the same time that B is to perform the covenant entered into by him, A's covenant and B's are concurrent.

§1453. Intention of parties paramount.

The question whether a covenant is independent or dependent turns entirely upon the intention of the parties as shown in the entire contract, and the tests hereinafter suggested, while of great help, cannot be conclusive in every case. "The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed upon the language employed by the parties to express their agreement. . . . If parties think proper they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand,

¹New Orleans v. Ry., 171 U. S.

they may agree that the performance by one shall be a condition precedent to performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract?"¹ "It is said 'where the acts stipulated to be done are to be done at different times the stipulations are to be construed as independent of each other.' This as a general rule is correct, but it is subject to the intention of the parties as signified in the language of the contract. The great rule is to ascertain the intent of the parties from the language used."² The tendency of the Common Law was, wherever possible, to construe the covenants of a contract as independent each of the other.³ There is a strong tendency in modern decisions to treat covenants as dependent, if possible, on the ground that such construction is the most fair and just.⁴ As between precedent and concurrent covenants the tendency of Modern Law is to construe covenants as concurrent rather than precedent.⁵ A covenant may be precedent as to certain covenants of the adversary party and subsequent as to others. Under a building contract requiring payment by installments at certain specified dates and requiring the building to be completed at an intervening date, the completion of the building was a condition precedent to the payment of the installments due after the date fixed for completion.⁶ A contract to pay A a certain sum for exploring land, and his necessary traveling expenses, does not make payment of such expenses a condition

¹ *Loud v. Water Co.*, 153 U. S. 564, 576.

² *Slater v. Emerson*, 19 How. (U. S.) 224, 238.

³ *Ware v. Chappell*, Style 186.

⁴ *Bank v. Hagner*, 1 Pet. (U. S.) 455; *Mecum v. Ry.*, 21 Ill. 533; *Smith v. R. R.*, 6 All. (Mass.) 262; *Hamilton v. Thrall*, 7 Neb. 210; *Lutz v. Thompson*, 87 N. C. 334; *Scheland v. Erpelding*, 6 Or. 258; *Davis v. Jeffris*, 5 S. D. 352; 58 N. W. 815. "Although many nice distinctions are to be found in the books upon the question whether

the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident the inclination of the courts has strongly favored the latter construction as being obviously the most just." *Bank v. Hagner*, 1 Pet. (U. S.) 455, 464. To the same effect, *Telfener v. Russ*, 162 U. S. 170.

⁵ *Deacon v. Blodgett*, 111 Cal. 416; 44 Pac. 159.

⁶ *Dermott v. Jones*, 23 How. (U. S.) 220.

precedent to A's doing the work, and hence failure to advance such expenses is not a breach.⁷

§1454. Non-performance of precedent covenants.

No recovery can be had upon a contract by a party who has not performed the conditions precedent on his part to be performed.¹ The party in default in performance of a condition precedent cannot recover damages from the adversary party for his default in performance of subsequent covenants.² He cannot treat such breach of a subsequent covenant as a ground for discharge.³ Thus a building contractor who has failed of substantial performance cannot treat the subsequent refusal of the owner to pay an installment thereafter due as discharging him from liability on the contract.⁴ Performance of a condition precedent is necessary to the enforcement of covenants subsequent thereto.⁵ Thus under a contract to give a railroad

⁷ *Sherk v. Holmes*, 125 Mich. 118; 83 N. W. 1016.

¹ *Bank v. Trading Co.* (1894), A. C. 266; *Loud v. Water Co.*, 153 U. S. 564; *Hull, etc., Co. v. Coke Co.*, 113 Fed. 256; *Aarnes v. Windham*, 137 Ala. 513; 34 So. 816; *Whitley v. Murray*, 34 Ala. 155; *Hill v. Grigsby*, 35 Cal. 656; *Thomson v. Kyle*, 39 Fla. 582; 63 Am. St. Rep. 193; 23 So. 12; *Lake Shore, etc., Ry. v. Richards*, 152 Ill. 59; 30 L. R. A. 33; 38 N. E. 773; *Angle v. Hanna*, 22 Ill. 429; 74 Am. Dec. 161; *Van Sicklen v. Ballard*, 97 Ill. App. 640; *Vinton v. Baldwin*, 88 Ind. 104; 45 Am. Rep. 447; *White v. Day*, 56 Ia. 248; 9 N. W. 210; *National Contracting Co. v. Commonwealth*, 183 Mass. 89; 66 N. E. 639; *Wiley v. Athol*, 150 Mass. 426; 6 L. R. A. 342; 23 N. E. 311; *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Aaron v. Moore*, 34 Mo. 79; *Franklin v. Shultz*, 23 Mont. 165; 57 Pac. 1037;

Cornell v. Cornell, 96 N. Y. 108; *Bonesteel v. New York*, 22 N. Y. 162; *Cunningham v. Jones*, 20 N. Y. 486; *Gilbert v. Port*, 28 O. S. 276; *Lyndon Granite Co. v. Farrar*, 53 Vt. 585; *Williams v. Thrall*, 101 Wis. 337; 76 N. W. 599.

² *Griffin v. Machine Co.*, 135 Ala. 490; 33 So. 177; *Tufts v. Sams*, 47 Mo. App. 487; *Hale v. Sheehan*, 52 Neb. 184; 71 N. W. 1019; *Lake v. McElfatrick*, 139 N. Y. 349; 34 N. E. 922; *Ingram v. Mining Co.*, 25 Wash. 318; 65 Pac. 549.

³ *Barrett v. Verdery*, 93 Ga. 526; 21 S. E. 64; *Coldren v. Clark*, 93 Ia. 352; 61 N. W. 1045; *Reddish v. Smith*, 10 Wash. 178; 45 Am. St. Rep. 781; 38 Pac. 1003.

⁴ *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114; 38 Pac. 635.

⁵ *National Surety Co. v. Long*, 125 Fed. 887; *Marshall v. Bumby*, 25 Fla. 619; 6 So. 480.

company a right of way if a certain route were selected, the selection of such route is a condition precedent to obtaining such right of way.⁶ Under a contract to pay a certain sum of money in aid of a railroad if it is ready for operation by a certain time, getting it ready for operation by such time is a condition precedent to enforcing payment.⁷ A contract to pay when a certain railroad "is constructed and the cars are running thereon between" certain specified points, does not make the construction of the entire road a condition precedent, but only the construction and operation of the road between the points named.⁸ Under a contract to sell certain land at a certain price if the vendee shall pay a pre-existing note to the vendor,⁹ or to convey certain realty and relinquish a tree-claim, such contract "not to be performed until" the grantee shall pay a debt owing by him to a third party and secured by a mortgage upon personalty the transfer of which is the consideration for such contract,¹⁰ the payment of such debt is in each case a condition precedent. Under a bond for a deed which declares that improvements to be made on the realty conveyed are the chief condition, and are to be made by a certain date, the construction of such improvements is a condition precedent to the delivery of such deed.¹¹ If payment is to be made in advance, failure to make such payment discharges the contract and no recovery can be had thereon.¹²

§1455. Illustrations of precedent covenants.

A covenant is precedent when by the terms of the contract it is to be performed before a covenant is to be performed by the adversary party. A contract to pay a certain amount when a certain tract is sold, makes the sale of such tract a

⁶ *New Orleans v. Ry.*, 171 U. S. 312.

⁷ *Persinger v. Beville*, 31 Fla. 364; 12 So. 366.

⁸ *Gardner v. Walsh*, 95 Mich. 505; 55 N. W. 355.

⁹ *Schields v. Horbach*, 30 Neb. 536; 46 N. W. 629.

¹⁰ *Wright v. Wilcox*, 52 Minn. 438; 54 N. W. 483.

¹¹ *Haggerty v. Land Co.*, 89 Ala. 428; 7 So. 651.

¹² *Building contract. Harris's Assignee v. Gardner* (Ky.), 68 S. W. 8. *Charter of steamer. Goff v. Ry.*, 9 Wash. 386; 37 Pac. 418.

condition precedent to such payment.¹ An agreement that a contract should take effect only on approval by the attorney of one of the parties thereto is a condition precedent.² Under a building contract requiring the contractor to give bond, giving such bond is a condition precedent, and his offer to begin work without giving bond cannot put the adversary party in default.³ Under a contract which provides for issuing a warrant and an assessment attached thereto when a contract for grading a street is completed, completion of such contract is a condition precedent to the issuing of such warrant.⁴ A covenant to furnish pipe for use in putting in a well is precedent to a covenant to use such pipe in the construction of the well.⁵

§1456. Contracts with common carriers.

A clause in a railway ticket providing that it must be stamped by the agent of the company at the terminal point to be good for the round trip, imposes a condition which must be complied with before such ticket can be used.¹

§1457. Insurance contracts.

Failure to take an inventory,¹ or to make proof of loss,² or to have appraisers make a finding as to the amount of the loss,³

¹ *Morris v. Davis*, 83 Va. 297; 8 S. E. 247.

² *Bank v. Sturdee*, 32 N. B. 398; *Ware v. Allen*, 128 U. S. 590.

³ *Flynn v. Dougherty* (Cal.), 26 Pac. 831.

⁴ *Connolly v. San Francisco* (Cal.), 33 Pac. 1109.

⁵ *Olson v. Viroqua*, — Wis. —; 99 N. W. 326.

¹ *Boylan v. Ry.*, 132 U. S. 146; *Edwards v. Ry.*, 81 Mich. 364; 21 Am. St. Rep. 527; 45 N. W. 827; *Bowers v. Ry.*, 158 Pa. St. 302; 27 Atl. 893; *Bethea v. Ry.*, 26 S. C. 91; 1 So. 372; *Russell v. Ry.*, 12 Tex. Civ. App. 627; 35 S. W. 724.

¹ *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622; 78 Am. St.

Rep. 216; 52 L. R. A. 70; 36 S. E. 821.

² *McCormack v. Ins. Co.*, 78 Cal. 468; 21 Pac. 14; *Brock v. Ins. Co.*, 96 Ia. 39; 64 N. W. 685; *American Central Ins. Co. v. Hathaway*, 43 Kan. 399; 23 Pac. 428; *Fuller v. Ins. Co.*, 184 Mass. 12; 67 N. E. 879; *Cook v. Ins. Co.*, 181 Mass. 101; 62 N. E. 1049; *Woodmen's Accident Association v. Pratt*, 62 Neb. 673; 89 Am. St. Rep. 777; 55 L. R. A. 291; 87 N. W. 546; *Union Ins. Co. v. McGookey*, 33 O. S. 555; *Niagara Ins. Co. v. Lee*, 73 Tex. 641; 11 S. W. 1024.

³ *Hamilton v. Ins. Co.*, 137 U. S. 370; *Vincent v. Ins. Co.*, 120 Ia. 272; 94 N. W. 458; *Zalesky v. Ins.*

as required by the terms of the policy as a condition precedent to recovery defeats recovery thereon. A contract of insurance in a fraternal association may require the insured to exhaust the remedies afforded by the tribunals of the association before resorting to litigation.⁴

§1458. Discharge of liens.

A provision in a building contract, that final payment shall be made upon satisfactory proof that all liens against the building have been discharged, makes payment of such liens a condition precedent to the recovery of final payment.¹ A contract imposing payment of liens as a condition precedent, is substantially performed, however, if the time within which liens upon the property can be filed has lapsed, and no liens have been filed.² It has been held that if the lien is liquidated the contractor may enforce payment of the difference between the amount due him and the amount of such lien, leaving the owner to pay such lien.³

Jo., 102 Ia. 613; 71 N. W. 566; Chippewa Lumber Co. v. Ins. Co., 80 Mich. 116; 44 N. W. 1055; Gasser v. Sun Fire Office, 42 Minn. 315; 44 N. W. 252; Wolff v. Ins. Co., 50 N. J. L. 453; 14 Atl. 561; Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558; 61 S. W. 787; Chapman v. Ins. Co., 89 Wis. 572; 28 L. R. A. 405; 62 N. W. 422.

⁴ Supreme Council, etc., v. For-singer, 125 Ind. 52; 21 Am. St. Rep. 196; 9 L. R. A. 501; 25 N. E. 129; Supreme Council, etc., v. Garrigus, 104 Ind. 133; 54 Am. Rep. 298; 3 N. E. 818; Bauer v. Samson Lodge, 102 Ind. 262; 1 N. E. 571; Jeane v. Grand Lodge, 86 Me. 434; 30 Atl. 70; Cotter v. Grand Lodge, 23 Mont. 82; 57 Pac. 650; Levy v. Iron Hall, 67 N. H. 593; 38 Atl. 18; Myers v. Jenkins, 63 O. S. 101; 81 Am. St. Rep. 613; 57 N. E. 1089; Schryver

v. Columbia Lodge, 3 Ohio C. C. 422.

¹ Erickson v. Brandt, 53 Minn. 10; 55 N. W. 62; Franklin v. Schultz, 23 Mont. 165; 57 Pac. 1037.

² Monmouth Park Assoc. v. Wallis Iron Works, 55 N. J. L. 132; 39 Am. St. Rep. 626; 19 L. R. A. 456; 26 Atl. 140; Mills v. Ry., 90 Va. 523; 19 S. E. 171; and see s. c., 91 Va. 613; 22 S. E. 556.

³ Huckestein v. Kelly, etc., Co., 152 Pa. St. 631; 25 Atl. 747. But in Negley v. Jeffers, 28 O. S. 90, a contract by a vendor to remove liens on realty before the last payment from the vendee should be due is a condition precedent and a waiver of such condition and agreement that the amount of such liens should be deducted from the purchase price and the balance paid was held to be a valuable consideration.

§1459. Contracts for work and labor.

Under a contract by which the owner of land agrees to pay to the promoter of a railroad five thousand dollars when he shall extend his railroad southerly to a certain section of land, and ten thousand dollars if the land sells at a specified price per acre, the extension of such railroad is a condition precedent to recover under the contract, and without such extension the promoter of the railroad cannot recover, even if the land sells for the stipulated amount.¹ Under a contract for paying for work in installments, and retaining part of the amount due each month as a security for the faithful performance, complete performance is a condition precedent to the recovery of any part of such reserve.² Under a contract to dig a well, to reach a suitable supply of water, reaching such suitable supply is a condition precedent to the recovery.³ Under a contract to pay a certain sum to a university, if within thirty days the university should permanently locate the university buildings, to cost not less than one hundred thousand dollars, upon a given tract of land, the location of such buildings, and not their erection, constitutes the condition precedent. The covenant as to the cost of the buildings is merely a stipulation.⁴

§1460. Contracts of sale.

Under an agreement by a vendee of property, to pay part of the purchase price in advance, payment is a condition precedent to his enforcing delivery of the property sold.¹ A provision requiring notice to be given by the vendee before the vendor was to ship the goods sold, is a condition precedent to the vendee's liability.² A stipulation in a contract to sell, that the goods sold were to be shipped by "sailer or sailers" within a specified time,

¹ *Stevens v. Ambler*, 39 Fla. 575; 23 So. 10.

² *Wagar Lumber Co. v. Logging Co.*, 120 Ala. 558; 24 So. 949.

³ *Sherzer v. Buckholz*, 108 Ia. 749; 78 N. W. 818; *Jackson v. Creswell*, 94 Ia. 713; 61 N. W. 383.

⁴ *Judson University v. Kinkaid*, 50 Kan. 369; 31 Pac. 1074.

¹ *Straus v. Russell Co.*, 85 Fed. 589; *Langley v. Rodriguez*, 122 Cal. 580; 68 Am. St. Rep. 70; 55 Pac. 406; *Stokes-Evans Co. v. Oil Co.*, — Miss. —; 33 So. 283.

² *Maddox v. Wagner*, 111 Ga. 146; 36 S. E. 609.

is a condition precedent, and the vendor cannot hold the vendee liable for the goods so shipped by steamer, and not within such time.³ The formation of a corporation is a condition precedent to enforcing a contract of subscription for corporate stock.⁴ Under a contract to deliver certain shares of stock when certain syndicates have completed the subscription to the securities of a given corporation, performance by the syndicate is a condition precedent to the delivery of such stock.⁵ A contract with an agent for commissions depends upon the vendee's taking the property and paying therefor.⁶ Under a contract to give certain rebates to a vendee if he buys for a certain period of time from the vendor exclusively, such exclusive patronage is a condition precedent to the recovery of such rebates.⁷ Under a contract for the exchange of realty providing that the contract is to be void unless each can furnish an abstract showing title, the ability of each party to furnish such abstract is a condition precedent.⁸ If payment is to be according to the measurement of the property contracted for, such measurement is a condition precedent to payment.⁹ A contract to pay a certain sum for a receipt for dyeing hosiery a certain shade of black, payment to be made on a certain day if the color is right, makes the production of such color by means of such receipt, if used in good faith, a condition precedent to payment.¹⁰ Under a contract whereby A agrees to cancel certain notes and a mortgage when B surrenders certain property to A, A's refusal to cancel them when B has surrendered part but not all of such property, is not a breach.¹¹

³ *Ashmore v. Cox* (1899), 1 Q. B. 436.

⁴ *McCoy v. Columbian Exposition*, 186 Ill. 356; 78 Am. St. Rep. 288; 57 N. E. 1043; *Brooksville Ry. Co. v. Byron* (Ky.), 50 S. W. 530.

⁵ *Becker's Estate*, 166 Pa. St. 313; 31 Atl. 95.

⁶ *Pryor v. Jolly*, 91 Tex. 86; 40 S. W. 959.

⁷ *Dennehy v. McNulta*, 86 Fed. 825; 41 L. R. A. 609; 30 C. C. A. 422.

⁸ *McLaughlin v. McAllister*, 36 Fed. 745.

⁹ *Street paving. New Telephone Co. v. Foley*, 28 Ind. App. 418; 63 N. E. 56. *Logs. Jesmer v. Rines*, 37 Minn. 477; 35 N. W. 180. *Sale of marble. Lowry v. Barelli*, 21 O. S. 324.

¹⁰ *Hecht v. Taubel*, 55 N. J. L. 419; 26 Atl. 902.

¹¹ *Ward v. Sherman*, 192 U. S. 168; reversing. — *Ariz.* —; 64 Pac. 434.

§1461. Notice as condition precedent.

By the terms of the contract a notice by one party may be necessary before the adversary party can be compelled to perform certain covenants. Thus a contract to furnish a certain amount of water if required, is operative only when clear and explicit notice to that effect is given.¹ So, under a contract to keep a pavement in good condition and repair for five years, the city engineer to determine whether such pavement is in satisfactory condition, and repairs to be made upon notice by the board of public works, no liability rests upon the contractor until such notice is given, and if none is given during the five years he may recover an installment of the price for laying the pavement reserved to secure performance of his contract to repair.² Different principles apply if the notice is to be evidence, though not necessarily the sole evidence of performance. If a payment is to be made when certain work is done and a notice to that effect given by the party to do such work is to be conclusive that it has been done, payment may be enforced when the work is done, even if the notice is defective.³ If the provision for arbitration in effect makes it necessary on demand of either party, such demand or offer of arbitration is a condition precedent to the operation of the arbitration clause.⁴

§1462. Provisions for arbitration.

The extent to which provisions for arbitration are valid has already been discussed.¹ Under a contract for submitting disputes as to value to arbitration, such submission is a condition precedent to recovery.² Under a contract to refer disputes to

¹ *Wilson v. Charlotte*, 110 N. C. 449; 14 S. E. 961.

² *Southern Paving Co. v. Chattanooga* (Tenn. Ch. App.), 48 S. W. 92.

³ *Hall v. Sims*, 106 Ala. 561; 17 So. 534.

⁴ *Grand Rapids Fire Ins. Co. v. Finn*, 60 O. S. 513; 71 Am. St. Rep.

736; 50 L. R. A. 555; 54 N. E. 545.

¹ See §§ 348, 349, 350.

² *Holmes v. Richet*, 56 Cal. 307; 38 Am. Rep. 54; *Weggner v. Greenstine*, 114 Mich. 310; 72 N. W. 170; *Ball v. Doud*, 26 Or. 14; 37 Pac. 70; *Baer's Sons Grocer Co. v. Fruit-Packing Co.*, 42 W. Va. 359; 26 S. E. 191.

a designated person, a refusal to submit such disputes precludes recovery by the contractor.³ Thus under a building contract a provision that the architect shall decide the value of alterations;⁴ or shall certify the progress of the work done, on which certificate installments of the contract price are to be paid;⁵ or providing for his deciding other questions in dispute between the parties, makes such decision conclusive if it is made in good faith and not under evident mistake.⁶ The same principles apply to contracts for constructing waterworks.⁷ So, under a contract referring questions as to the measurement of logs delivered under such contract to a third person, his decision is conclusive in the absence of fraud or evident mistake.⁸ A provision for arbitration as to questions arising on one branch of the contract does not apply to questions arising on another branch thereof.⁹

§1463. Approval of architect or engineer as condition precedent.

Examples of conditions precedent, the non-performance of which suspends the right of action until such conditions are performed, are often found in building and construction contracts. Under a provision that payment is to be made upon certificates to be given by a third person, such certificate is, when given, conclusive, in the absence of fraud or evident mistake.¹ A provision, that an estimate of work is to be made by an en-

³ *Meyers v. Construction Co.*, 20 Or. 603; 27 Pac. 584; *Fulton v. Peters*, 137 Pa. St. 613; 20 Atl. 936.

⁴ *Seim v. Krause*, 13 S. D. 530; 83 N. W. 583; *East Tennessee, etc., Ry. v. Mfg. Co.*, 95 Tenn. 538; 32 S. W. 635.

⁵ *Ashland, etc., Co. v. Shores*, 105 Wis. 122; 81 N. W. 136.

⁶ *Gowen v. Pierson*, 166 Pa. St. 258; 31 Atl. 83.

⁷ *Covington v. Limerick (Ky.)*, 40 S. W. 254.

⁸ *Bullock v. Lumber Co. (Cal.)*, 31 Pac. 367; *Nadeau v. Pingree*, 92

Me. 196; 42 Atl. 353; *Boyle v. Musser-Sauntry, etc., Co.*, 77 Minn. 206; 79 N. W. 659.

⁹ *Fontano v. Robbins*, 18 App. D. C. 402.

¹ *The Queen v. Cimon*, 23 Can. S. C. 62; *Newman v. United States*, 81 Fed. 122; *Elliott v. Ry.*, 74 Fed. 707; 21 C. C. A. 3; *Mundy v. Ry.*, 67 Fed. 633; *Pauly, etc., Mfg. Co. v. Hemphill County*, 62 Fed. 698; 10 C. C. A. 595; *Lewis v. Ry.*, 49 Fed. 708; *Summers v. Ry.*, 49 Fed. 714; *Fitzgerald v. Walker*, 55 Ark. 148; 17 S. W. 702; *Jones & Hotchkiss Co. v. Davenport*, 74 Conn. 418; 50

gineer,² or by an architect,³ and that a certificate must be obtained from such engineer or architect that the work done is done in a proper manner, before the contractor can recover for such work, is generally upheld as a valid covenant.⁴ The fact that the engineer is in the employment of one of the parties to the contract, and is therefore possibly biased in his judgment,⁵ or that he is a stockholder,⁶ or a former member of a board of directors,⁷ of the adversary party to the contract, does not make such provision unenforceable. Under such clause the obtaining of such certificate is a condition precedent to any recovery by the contractor upon his contract unless the obtaining of such certificate is excused or waived in some manner.⁸ So, an ap-

Atl. 1028; *Chapman v. Ry.*, 114 Mo. 542; 21 S. W. 858; *Brady v. New York*, 112 N. Y. 480; 2 L. R. A. 751; 20 N. E. 390; *Gonder v. Ry.*, 171 Pa. St. 492; 33 Atl. 61; *McAlpine v. Academy*, 101 Wis. 468; 78 N. W. 173.

² *Mundy v. Ry.*, 67 Fed. 633; *Lewis v. Ry.*, 49 Fed. 708; *Summers v. Ry.*, 49 Fed. 714; *Barlow v. United States*, 35 Ct. Cl. 514; modified and affirmed, 184 U. S. 123; *Ross v. McArthur*, 85 Ia. 203; 52 N. W. 125.

³ *Mitchell v. Dougherty*, 86 Fed. 859; *Kelly v. Muskegon*, 110 Mich. 529; 68 N. W. 282; *Anderson v. Imhoff*, 34 Neb. 335; 51 N. W. 854.

⁴ *Contra*, if the contract is for conclusive determination. *Fulton County v. Gibson*, 158 Ind. 471; 63 N. E. 982; or is for arbitration in advance upon the question whether the agreement has been violated. *Jones v. Brown*, 171 Mass. 318; 50 N. E. 648.

⁵ *Eckersley v. Harbor Board* (1894), 2 Q. B. 667; *Ives v. Willans* (1894), 2 Ch. 478; *Ogden v. United States*, 60 Fed. 725.

⁶ *Williams v. Ry.*, 112 Mo. 463; 34 Am. St. Rep. 403; 20 S. W. 631.

⁷ *Chicago Athletic Association v. Mfg. Co.*, 77 Ill. App. 204.

⁸ *Hot Springs, etc., Ry. Co. v. Maher*, 48 Ark. 522; 3 S. W. 639; *Stose v. Heissler*, 120 Ill. 433; 60 Am. Rep. 563; 11 N. E. 161; *Barney v. Giles*, 120 Ill. 154; 11 N. E. 206; *Coey v. Lehman*, 79 Ill. 173; *Packard v. Van Schoick*, 58 Ill. 79; *Gillis v. Cobe*, 177 Mass. 584; 59 N. E. 455; *Hanley v. Walker*, 79 Mich. 607; 8 L. R. A. 207; 45 N. W. 57; *McGlauffin v. Wormser*, 28 Mont. 177; 72 Pac. 428; *Kirtland v. Moore*, 40 N. J. Eq. 106; 2 Atl. 269; *Wangler v. Swift*, 90 N. Y. 38; *Smith v. Briggs*, 3 Denio (N. Y.) 73; *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442; *Ashley v. Henahan*, 56 O. S. 559; 47 N. E. 573; *O'Reilly v. Kernes*, 52 Pa. St. 214; *Boettler v. Tendick*, 73 Tex. 488; 5 L. R. A. 270; 11 S. W. 497; *Scott v. Construction Co.* (Tex. Civ. App.), 55 S. W. 37; *McConnell v. Hewes*, 50 W. Va. 33; 40 S. E. 436; *Coorsen v. Ziehl*, 103 Wis. 381; 79 N. W. 562; *John Pritzlaff Hardware Co. v. Berghoefer*, 103 Wis. 359; 79 N. W. 564; *Burnham v. Milwaukee*, 100 Wis. 55; 75 N. W. 1014; *Forster Lumber Co. v. Atkinson*, 94

proval by a state board,⁹ or by a highway inspector,¹⁰ may be made a condition precedent to recovery on the contract. So, if a contract of sale to the United States provides for payment "upon producing duplicate specified certificates of the commanding officer," no recovery can be had unless such certificates are produced or a legal excuse shown for not producing them.¹¹ The certificate of the architect may be required as a condition precedent for pay for extra work.¹² On the one hand, in the absence of fraud or evident mistake, the certificate given by the architect or engineer is binding upon the contractor.¹³ Thus the architect's decision that certain paving was not constructed in accordance with the contract¹⁴ is conclusive. After the engineer or architect has once decided the question, which under the terms of the contract he was to decide, and has given his certificate passing upon such fact, he cannot reconsider such question and give a certificate to the contrary effect;¹⁵ nor can his successor,¹⁶ nor another engineer in the owner's employ.¹⁷ An engineer cannot by approving stone to be quarried from a specified quarry, preclude his successor from rejecting the stone actually offered under such contract.¹⁸ After the certificate has once been delivered to take effect, the subsequent fate of the instrument is immaterial. Hence, if the contractor re-delivered the certificate to the architect, such certificate is still binding upon the owner.¹⁹ The certificate of the architect, or engineer,

Wis. 578; 69 N. W. 347; *Wendt v. Vogel*, 87 Wis. 462; 58 N. W. 764.

⁹ *Winters v. Ramsey*, 4 Ida. 303; 39 Pac. 193.

¹⁰ *Jones v. Marlborough*, 70 Conn. 583; 40 Atl. 460.

¹¹ *United States v. Robeson*, 9 Pet. (U. S.) 319.

¹² *North American Ry. Construction Co. v. Surveying Co.*, 116 Fed. 169; *Guthat v. Gow*, 95 Mich. 527; 55 N. W. 442.

¹³ *Bowe v. United States*, 42 Fed. 761; *Thompson v. Bradbury*, 5 Ida. 760; 51 Pac. 758; *Brownell Improvement Co. v. Critchfield*, 197 Ill. 61; 64 N. E. 332; *In re Freel*, 148

N. Y. 165; 42 N. E. 586; *Craig v. Geddis*, 4 Wash. 390; 30 Pac. 396.

¹⁴ *Brownell Improvement Co. v. Critchfield*, 197 Ill. 61; 64 N. E. 332.

¹⁵ *Gulf, etc., Ry. v. Ricker (Tex.)*, 17 S. W. 382.

¹⁶ *Murray v. Regina*, 26 Can. S. C. 203.

¹⁷ *Chicago, etc., Ry. v. Price*, 138 U. S. 185.

¹⁸ *United States v. Barlow*, 184 U. S. 123; modifying, 35 Ct. Cl. 514.

¹⁹ *Arnold v. Bournique*, 144 Ill. 132; 36 Am. St. Rep. 419; 20 L. R. A. 493; 33 N. E. 530.

or acceptance by him of work done, is binding upon the owner, and in the absence of fraud or evident mistake, the owner is concluded thereby as to all questions which such certificate purports to pass upon, if the party giving the certificate was made by the terms of the contract the proper person to pass upon such question.²⁰ Conversely if a certificate of failure of performance is to be given by the architect to enable the owner to terminate the contract and to complete the work himself, the omission to give such certificate prevents the owner from acting under such clause of the contract,²¹ and his subsequent certificate of the cost of such completion is not conclusive and is not even admissible as evidence.²² By specific provision, however, the certificate of an engineer may be conclusive upon the contractor but not upon the public officers with whom the contract is made or their successors.²³ The contract may provide that the architect shall determine the meaning thereof.²⁴ Under such a clause his decision that a stipulation for damages for each day's delay is a covenant for liquidated

²⁰ *Sheffield, etc., Ry. v. Gordon*, 151 U. S. 285; *Martinsburg, etc., Ry. v. March*, 114 U. S. 549; *Tally v. Parsons*, 131 Cal. 516; 63 Pac. 833; *O'Keefe v. Church*, 59 Conn. 551; 22 Atl. 325; *McGuire v. Rapid City*, 6 Dak. 346; 5 L. R. A. 752; 43 N. W. 346; *Wilcox v. Stephenson*, 30 Fla. 377; 11 So. 659; *International Cement Co. v. Blifeld*, 173 Ill. 179; 50 N. E. 716; *Korf v. Lull*, 70 Ill. 420; s. c., 84 Ill. 225; *Schuler v. Eckert*, 90 Mich. 165; 51 N. W. 198; *Standard Stamping Co. v. Hemminghaus*, 157 Mo. 23; 57 S. W. 746; *Nofsinger v. Ring*, 71 Mo. 149; 36 Am. Rep. 456; *Sisters of Charity v. Smith* (N. J. Eq.), 46 Atl. 598; *Bowman v. Stewart*, 165 Pa. St. 394; 30 Atl. 988; *Kennedy v. Poor*, 151 Pa. St. 472; 25 Atl. 119; *Boettler v. Tendick*, 73 Tex. 488; 5 L. R. A. 270; 11 S. W. 497; *Hughes v. Bravinder*, 9 Wash. 595;

38 Pac. 209. "It is difficult to see what effect should be given the acceptance of work by the superintendent, if not to foreclose the parties from thereafter claiming that the contract had not been performed according to its terms." *Sheffield, etc., Co. v. Gordon*, 151 U. S. 285, 292.

²¹ *Champlain Construction Co. v. O'Brien*, 104 Fed. 930; *O'Keefe v. Church*, 59 Conn. 551; 22 Atl. 325; *International Cement Co. v. Blifeld*, 173 Ill. 179; 50 N. E. 716; *Charlton v. Scoville*, 144 N. Y. 691; 39 N. E. 394.

²² *Charlton v. Scoville*, 144 N. Y. 691; 39 N. E. 394.

²³ *O'Brien v. New York*, 139 N. Y. 543; 35 N. E. 323.

²⁴ *Hennessy v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267; 38 N. E. 1058.

damages and not for a penalty is conclusive.²⁵ It has been held that if the certificate does not specifically make the certificate of the architect a condition precedent to any recovery, but merely provides that payment shall be made upon such certificate, a contractor who has fully performed may recover on the common counts without producing such certificate or accounting for its absence.²⁶

§1464. Who can determine performance as condition precedent.

An architect or engineer cannot delegate his authority to decide questions of fact,¹ unless the parties to the building contract acquiesce in the selection of the person whom he designates.² The determination of an architect or engineer agreed upon by the parties to the contract, is not binding upon third persons who have contracts with either the owner or contractor,³ unless the contract with such third person makes performance of his contract subject to the approval of such engineer.⁴ The certificate given by the architect is not a performance of a condition precedent, unless it shows on its face his determination in the contractor's favor of all the facts made by the contract conditions precedent, and the enforcement of liability by the contractor.⁵ Thus a certificate that a certain amount of railroad track is "laid, that trains have been run over the same, and that it is in a suitable condition for traffic," does not entitle the contractor to payment where he was to be paid when such amount of track was "fully completed and equipped" in "suitable condition for running trains thereon," and providing that the certificate of the engineer should be conclusive.⁶ On the other hand, a finding by the architect,

²⁵ *Hennessy v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267; 38 N. E. 1058.

²⁶ *Davis v. Badders*, 95 Ala. 348; 10 So. 422; *Gillis v. Cobe*, 177 Mass. 584; 59 N. E. 455.

¹ *Spencer v. Silk Co.*, 112 Fed. 638.

² *Haskin-Wood Vulcanizing Co. v.*

Ship-Building Co., 94 Va. 439; 26 S. E. 878.

³ *Barclay v. Deckerhoof*, 171 Pa. St. 378; 33 Atl. 71.

⁴ *Jones v. Risley*, 91 Tex. 1; 32 S. W. 1027.

⁵ *Mockler v. St. Vincent's Institution*, 87 Mo. App. 473.

⁶ *Kansas City, etc., Ry. v. Perk-*

that a certain amount should be retained until it is determined whose fault it is that certain work has not been done, is not conclusive that it was the fault of the contractor, and does not therefore prevent him from recovering such amount if he can show that the fault was not his.⁷ Under a provision in a contract for payment when the building is "completed and accepted by the architect," a written certificate of his approval, though valuable, is not indispensable.⁸ On the other hand, if a written certificate is provided for by the contract, the oral approval of the architect is insufficient if the owner has not waived the production of the written certificate.⁹ A mistake made by the engineer in issuing installment certificates, may be corrected by him at the final estimate.¹⁰ If the architect or engineer designated in the contract as the person to determine questions of performance, is subsequently discharged by his employer, he has no longer power to decide such questions,¹¹ and the contractor is not obliged to obtain his certificate,¹² but he may obtain a certificate from the architect actually in charge of the work.¹³ If, by the terms of the contract, questions of performance are to be decided by the owner and the architect, a decision of such question by the architect alone is not binding upon the owner.¹⁴

§1465. Power of architect.

The power of the architect or engineer to bind the employer, depends upon the power conferred upon him by such employer,

ins, 88 Tex. 66; *sub nomine*, Perkins v. Locke, 29 S. W. 1048.

⁷ Huckestein v. Kelly, etc., Co., 152 Pa. St. 631; 25 Atl. 747. And see Robinson v. Baird, 165 Pa. St. 505; 30 Atl. 1010.

⁸ Devlan v. Wells, 65 N. J. L. 213; 47 Atl. 467.

⁹ Lamprell v. Billericay Union, 3 Exch. 283.

¹⁰ O'Brien v. New York, 139 N. Y. 543; 35 N. E. 323.

¹¹ Wallis Iron Works v. Park As-

sociation, 55 N. J. L. 132; 39 Am. St. Rep. 626; 19 L. R. A. 456; 26 Atl. 140.

¹² Fitts v. Reinhart, 102 Ia. 311; 71 N. W. 227.

¹³ Griffith v. Happersberger, 86 Cal. 605, 614; 26 Pac. 137, 487.

¹⁴ Welch v. Woodworking Co., 61 N. J. L. 57; 38 Atl. 824; Sicilian Asphalt Paving Co. v. Williamsport, 186 Pa. St. 256; 40 Atl. 471; Pormann v. Walsh, 97 Wis. 356; 65 Am. St. Rep. 125; 72 N. W. 881.

either in the building contract with the contractor or in the contract of employment of such architect or engineer. Outside of such authority, the architect or engineer has not, by virtue of his position, general power to pass upon questions of fact and thereby to conclude his employer,¹ or to modify terms in the contract already entered into.² The adversary party is not precluded by the action of the architect any further than he has agreed in advance. Thus a provision requiring payment under the contract to be upon certificate but making no provision for extras, does not prevent the contractor from recovering for extras.³

§1466. Form of architect's certificate.

A provision that work is to be done to the satisfaction of a superintendent¹ does not require such satisfaction to be expressed in the form of a written certificate unless so stated. On the other hand, if the architect is to give a certificate of dissatisfaction with the work as done to enable the owner to terminate the employment of the contractor, such certificate cannot be given by a confidential letter written by the architect to the owner and not communicated to the contractor.²

§1467. Excuses for not obtaining approval.—Fraudulent and arbitrary action.

The contractor may, in some cases, excuse his failure to obtain the certificate of the architect. If he can show that the certificate was refused by the architect fraudulently, and in bad faith, he may recover without such certificate.¹ If he can

¹ Cannon v. Hunt, 113 Ga. 501; 38 S. E. 983.

² Leverone v. Arancio, 179 Mass. 439; 61 N. E. 45; McIntosh v. Hastings, 156 Mass. 344; 31 N. E. 288.

³ Jacob v. Weisser, 207 Pa. St. 484; 56 Atl. 1065.

¹ Gubbins v. Lautenschlager, 74 Fed. 160.

² Wilson v. Borden, 68 N. J. L. 627; 54 Atl. 815.

¹ Marks v. Ry., 76 Fed. 941; 22 C. C. A. 630; Spaulding v. Navigation Co., 5 Ida. 528; 51 Pac. 408; Michaelis v. Wolf, 136 Ill. 68; 26 N. E. 384; Illinois Central Ry. v. Manion, 113 Ky. 7; 67 S. W. 40; Williams v. Ry., 112 Mo. 463; 34 Am. St. Rep. 403; 20 S. W. 631;

show that the certificate is withheld fraudulently it is not necessary to show that the owner was a party to the fraud.² On the other hand, if the owner can show that the architect gave the certificate when it should not have been given, and that he acted fraudulently and in bad faith, he is not bound by the issuing of such certificate.³ If the contractor can show that the architect withheld his certificate arbitrarily, without in fact passing upon the question in dispute in a fair and honest manner, he may recover notwithstanding the absence of such certificate.⁴ Thus the architect cannot withhold the certificate because the sub-contractors and material men have not been paid where the chief contractor agrees that they may be paid out of the funds in the hands of the owner, which are ample for that purpose.⁵ If the architect withholds the certificate unreasonably, recovery can be had without it.⁶ So recovery can be had on a contract for constructing a bridge, which has cost more than six thousand dollars, which has been performed except certain work which would cost thirty dollars, and which, on account of climatic conditions it is impossible to perform until the next season.⁷ Such conduct amounts either to fraud or to evident mistake.⁸ The architect must act upon his own judgment in order to make his refusal to issue a certificate conclusive upon the contractor.⁹ Thus if he acts solely upon

Chism v. Schippen, 51 N. J. L. 1; 14 Am. St. Rep. 668; 2 L. R. A. 544; 16 Atl. 316; *Bradner v. Roffsell*, 57 N. J. L. 32; 29 Atl. 317; *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442; *Herrick v. Belknap*, 27 Vt. 673.

² *Chism v. Schipper*, 51 N. J. L. 1; 14 Am. St. Rep. 668; 2 L. R. A. 544; 16 Atl. 316.

³ *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449; *Tetz v. Butterfield*, 54 Wis. 242; 41 Am. Rep. 29; 11 N. W. 531.

⁴ *Crane Elevator Co. v. Clark*, 80 Fed. 705; *McDonald v. Patterson*, 186 Ill. 381; 57 N. E. 1027; *Pittsburgh Terra-Cotta Co. v. Sharp*, 190

Pa. St. 256; 42 Atl. 685; *Dyer v. Kittitas County*, 25 Wash. 80; 64 Pac. 1009; *Bently v. Davidson*, 74 Wis. 420; 43 N. W. 139.

⁵ *Mahoney v. Church*, 47 La. Ann. 1064; 17 So. 484.

⁶ *Bird v. Church*, 154 Ind. 138; 56 N. E. 129; *Coon v. Water Co.*, 152 Pa. St. 644; 25 Atl. 505.

⁷ *Washington Bridge Co. v. Improvement Co.*, 12 Wash. 272; 40 Pac. 982.

⁸ *Crane Elevator Co. v. Clark*, 80 Fed. 705.

⁹ So must a scaler selected by both parties. *Bresnahan v. Ross*, 103 Mich. 483; 61 N. W. 793.

the statements of his subordinates,¹⁰ or delegates to another the power to decide questions of performance,¹¹ or states objections made by his employer without exercising his own judgment as to the correctness of the objections made,¹² or withholds the certificate solely on the order of the owner,¹³ he has not exercised his own judgment as required by the contract, and his refusal to issue a certificate is not conclusive. So if the contract contains a clause providing that if in the judgment of two designated architects, the contractor delays completion an unreasonable length of time, the owner may, on three days' notice, complete the contract, both architects designated must exercise independent judgment, and an order to stop work is invalid if one of the architects, in declaring the delay unreasonable, relies entirely upon what the other architect tells him.¹⁴ The same principle applies where the scaler agreed upon by the parties to measure logs acts solely under the direction of an agent of the vendee.¹⁵ As long as the architect has not wrongfully refused to give a certificate of completion, the fact that the contractor fears such wrongful refusal, does not excuse him from omitting to apply for such certificate.¹⁶ The act of the owner, whereby he prevents the contractor from completing his contract,¹⁷ or makes it impossible for him to obtain the certificate, as where a contractor who puts in fire sprinklers is to get a certificate of approval from a board of fire underwriters and the board refuses such certificate for the sole reason that the water supply furnished by the owner was insufficient,¹⁸ or the wrongful refusal of the architect who is to issue such certificate to make an examination of the premises,¹⁹ or the

¹⁰ *Van Hook v. Burns*, 10 Wash. 22; 38 Pac. 763.

¹¹ *Monahan v. Fitzgerald*, 164 Ill. 525; 45 N. E. 1013.

¹² *Crane Elevator Co. v. Clark*, 80 Fed. 705.

¹³ *Foster v. McKeown*, 192 Ill. 339; 61 N. E. 514.

¹⁴ *Benson v. Miller*, 56 Minn. 410; 57 N. W. 943.

¹⁵ *Magee v. Smith*, 101 Wis. 511; 78 N. W. 167.

¹⁶ *Gilmore v. Courtney*, 158 Ill. 432; 41 N. E. 1023.

¹⁷ *St. Louis, etc., Ry. v. Kerr*, 153 Ill. 182; 38 N. E. 638; *Justice v. Elwert*, 28 Or. 460; 43 Pac. 649.

¹⁸ *New York, etc., Co. v. Andrews*, 173 N. Y. 25; 65 N. E. 776.

¹⁹ *McDonald v. Patterson*, 186 Ill. 381; 57 N. E. 1027; *Moran v. Schmitt*, 109 Mich. 282; 67 N. W. 323.

wrongful refusal of an arbitrator to act,²⁰ are acts which excuse compliance with such conditions precedent. Whether the architect has acted in good faith or not is a question of fact, to be determined by the tribunal trying the fact.²¹

§1468. Waiver by owner.

The owner may waive a provision of the contract providing for a certificate by the architect or engineer.¹ Thus the conduct of the owner in inspecting and approving material about to be used by the contractor,² or in taking charge of the building himself under a clause in the contract permitting him so to do,³ or in ignoring the clause providing for such certificate throughout the performance of the contract,⁴ or wrongfully breaking the contract and preventing performance,⁵ waives such provision. The fact that the owner has made one payment without requiring such certificate, does not waive the production of such certificate to obtain subsequent payment.⁶ A certificate given by an architect for an installment which is to be paid when the building is completed, does not waive the production of his certificate for installments due by the terms of the contract thereafter.⁷

§1469. Evident mistake.

Relief will be given if the architect issues his certificate under a clear mistake of fact,¹ or in clear violation of an express

²⁰ *Potter v. Holmes*, 72 Minn. 153; 75 N. W. 591.

²¹ *Long v. Pierce County*, 22 Wash. 330; 61 Pac. 142.

¹ *Smith v. Molleson*, 148 N. Y. 241; 42 N. E. 669.

² *Standard Stamping Co. v. Hemminghaus*, 157 Mo. 23; 57 S. W. 746.

³ *Campbell v. Coon*, 149 N. Y. 556; 38 L. R. A. 410; 44 N. E. 300.

⁴ *Boden v. Maher*, 105 Wis. 539; 81 N. W. 661; *Ashland, etc., Co. v. Shores*, 105 Wis. 122; 81 N. W. 136.

⁵ *West v. Luda*, 69 Conn. 60; 36 Atl. 1015. *Contra*, *Mitchell v. Dougherty*, 86 Fed. 859.

⁶ *McNamara v. Harrison*, 81 Ia. 486; 46 N. W. 976. See to the same effect, *Brown v. Winchill*, 3 Wash. 524; 28 Pac. 1037.

⁷ *Michaelis v. Wolf*, 136 Ill. 68; 26 N. E. 384; *Beharrell v. Quimby*, 162 Mass. 571; 39 N. E. 407.

¹ *United States v. Walsh*, 115 Fed. 697; 52 C. C. A. 419; *Bond v. New-ark*, 19 N. J. Eq. 376; *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449; *McEwen v. Nashville* (Tenn.

provision of the contract.² Thus a certificate that a building contract has been performed fully does not bind the owner if a heating apparatus provided for by the contract has not been furnished.³ Equity will give relief if the architect has been guilty of fraud or manifest error.⁴ If mistake exists, fraud need not also exist to entitle the party to relief.⁵

§1470. Concurrent covenants.

Concurrent covenants are those which by the terms of the contract are to be performed at the same time by each of the parties bound to perform them.¹ Either party must be ready to perform to put the other in default.² Thus under a contract for the sale of realty if no stipulation is made as to the order of time at which the deed is to be delivered and payment made, these acts are concurrent.³ Neither party can treat the other as being in default either for the purpose of considering the contract as discharged,⁴ or for bringing an action for damages,⁵

Ch. App.), 36 S. W. 968; Norfolk, etc., Ry. v. Mills, 91 Va. 613; 22 S. E. 556.

² Norfolk, etc., Ry. v. Mills, 91 Va. 613; 22 S. E. 556.

³ Mallard v. Moody, 105 Ga. 400; 31 S. E. 45.

⁴ O'Brien v. Construction Co., 107 Fed. 338; State v. Cuyahoga County, 12 Ohio C. D. 328.

⁵ Norfolk, etc., Co. v. Mills, 91 Va. 613; 22 S. E. 556.

¹ Frenzer v. Dufrene, 58 Neb. 432; 78 N. W. 719.

² J. G. Wagner Co. v. Monroe, 52 La. Ann. 2132; 28 So. 229; Frenzer v. Dufrene, 58 Neb. 432; 78 N. W. 719; Camp v. Wilson, 97 Va. 265; 33 S. E. 591.

³ Telfener v. Russ, 162 U. S. 170; Englander v. Rogers, 41 Cal. 420; Hill v. Grigsby, 35 Cal. 656; Newman v. Baker, 10 App. D. C. 187; Johnson v. Jackson, 27 Miss. 498; 61 Am. Dec. 522; Raudabaugh v. Hart, 61 O. S. 73; 76 Am. St. Rep.

361; 55 N. E. 214; Rummington v. Kelley, 7 Ohio (Second Part) 97; Webb v. Stevenson, 6 Ohio 282; Frink v. Thomas, 20 Or. 265; 12 L. R. A. 239; 25 Pac. 717; Gregg v. English, 38 Tex. 139; Clark v. Gordon, 35 W. Va. 735; 14 S. E. 255; Watson v. Coast, 35 W. Va. 463; 14 S. E. 249.

⁴ Ludlow v. Cooper, 4 O. S. 1; Frink v. Thomas, 20 Or. 265; 12 L. R. A. 239; 25 Pac. 717. The vendor cannot avoid. Avila v. Pereira, 120 Cal. 589; 52 Pac. 840; Gaughen v. Kerr, 99 Ia. 214; 68 N. W. 694; Corning v. Loomis, 111 Mich. 23; 69 N. W. 85; Johnson v. Eklund, 72 Minn. 195; 75 N. W. 14; McPherson v. Fargo, 10 S. D. 611; 65 Am. St. Rep. 723; 74 N. W. 1057. Vendee cannot avoid. Mahan v. Close, 63 Minn. 21; 65 N. W. 95.

⁵ Raudabaugh v. Hart, 61 O. S. 73; 76 Am. St. Rep. 361; 55 N. E. 214.

or for the purpose of enabling the vendor to forfeit such part of the purchase money as has been paid in,⁶ without either tendering performance, or notifying the adversary party of his willingness to perform and demanding performance by him. If one of the parties is able, ready and willing to perform, gives notice to the other of that fact and demands performance, this is sufficient to put the other in default if performance is refused.⁷ Mere readiness and willingness to perform without present ability is not sufficient.⁸ A and B entered into a contract whereby each was to furnish a machine for making shingles and B was to furnish the power; A was to operate the machines and B was to pay him for all shingles manufactured. A furnished a machine which was levied upon by his vendor for the unpaid purchase price and removed. A's willingness and readiness to perform were held not sufficient if he was unable to furnish the machine.⁹ So under a contract for the sale of personalty, if no stipulation is made as to the order in time of payment and delivery, they are concurrent.¹⁰ To put the one party in default the other must tender performance,¹¹ or without formal tender of performance, must offer to perform and demand performance of the adversary party.¹² Without such offer and demand the adversary party is not in default, either for the purpose of considering the contract as discharged, or for the purpose of recovering damages.¹³ An

⁶ *Gaughen v. Kerr*, 99 Ia. 214; 68 N. W. 694; *Corning v. Loomis*, 111 Mich. 23; 69 N. W. 85; *Johnson v. Eklund*, 72 Minn. 195; 75 N. W. 14; *Frink v. Thomas*, 20 Or. 265; 12 L. R. A. 239; 25 Pac. 717.

⁷ *Adams v. Turner*, 73 Conn. 38; 46 Atl. 247; *Frenzer v. Dufrene*, 58 Neb. 432; 78 N. W. 719.

⁸ *Leek Milling Co. v. Langford*, 81 Miss. 728; 33 So. 492.

⁹ *Leek Milling Co. v. Langford*, 81 Miss. 728; 33 So. 492.

¹⁰ *Eames v. Haver*, 111 Cal. 401; 43 Pac. 1120; *Cole v. Swanston*, 1 Cal. 51; 52 Am. Dec. 288; *Rice v. Appel*, 111 Ia. 454; 82 N. W. 1001;

Morton v. Clark, 181 Mass. 134; 63 N. E. 409; *W. A. McArthur Co. v. Bank*, 122 Mich. 223; 81 N. W. 92; *Lamont v. La Fevre*, 96 Mich. 175; 55 N. W. 687; *Fishback v. Van Dusen*, 33 Minn. 111; 22 N. W. 244; *Behrends v. Beyschlag*, 50 Neb. 304; 69 N. W. 835; *Vandegrift v. Engineering Co.*, 161 N. Y. 435; 48 L. R. A. 685; 55 N. E. 941; *Pratt v. Mfg. Co.*, 115 Wis. 648; 92 N. W. 368.

¹¹ *Vandegrift v. Engineering Co.*, 161 N. Y. 435; 48 L. R. A. 685; 55 N. E. 941.

¹² *Eames v. Haver*, 111 Cal. 401; 43 Pac. 1120.

¹³ *Campbell v. Moran Bros. Co.*,

offer to convey the thing agreed upon, such as a patent right,¹⁴ is, if refused, enough to put the adversary party in default. So if A who has agreed to furnish to B all the tin cans used in B's factory for a year, is unable on B's demand to furnish cans needed, B does not violate the contract by buying cans elsewhere.¹⁵ So under a contract whereby a railroad company agrees to furnish a certain amount of grain annually for storage at a certain elevator, the elevator company must be ready and willing to store such grain in order to put the railroad in default; and if it is not able to store the grain tendered the railroad is discharged from tendering the amount agreed upon.¹⁶ Under a contract to construct a creamery and cold-storage building to be built under a certain patent, and to furnish a patent deed from the owner of the patent conveying all rights thereunder, delivery or tender of such patent deed must be made before the contract price can be recovered.¹⁷ Since the intention of the parties determines whether covenants are precedent or concurrent, slight differences in phraseology may be decisive of different intentions. If the contract specifically provides that the deed is to be delivered after performance by the vendee, performance by the vendee is a condition precedent to and not concurrent with delivery of the deed by the vendor.¹⁸ The use of the word "after" is not conclusive that payment is a condition precedent since the context may show that it is a concurrent covenant. Thus a contract for a deed "after" certain payments are made, the vendee at the same time to deliver a bond and mortgage to secure a balance due makes delivery of the deed concurrent with the last payment to be made apart from that secured by

97 Fed. 477; 38 C. C. A. 293; Vandegrift v. Engineering Co., 161 N. Y. 435; 48 L. R. A. 685; 55 N. E. 941.

¹⁴ Adams v. Turner, 73 Conn. 38; 46 Atl. 247.

¹⁵ E. C. Dailey Co. v. Can Co., 128 Mich. 591; 87 N. W. 761.

¹⁶ Chicago, etc., Ry. v. Hoyt, 149

U. S. 1; Dunlap v. Ry., 151 Ill. 409, 428; 38 N. E. 89, 95.

¹⁷ Davis v. Jeffris, 5 S. D. 352, 363; 58 N. W. 815, 928.

¹⁸ Loud v. Water Co., 153 U. S. 564; Hill v. Fisher, 34 Me. 143; Kirtz v. Peck, 113 N. Y. 222; 21 N. E. 130; Gale v. Best, 20 Wis. 44.

mortgage.¹⁹ So a contract to convey "upon payment,"²⁰ or "as soon as" the purchase money is paid,²¹ provides for concurrent covenants.

§1471. Independent covenants.

Independent covenants are those in which the obligation of one party to perform is not conditioned upon either prior or contemporaneous performance by the adversary party of the covenants on his part to be performed. Breach of an independent covenant gives rise to an action for damages but does not operate as a discharge of the contract.¹ There are three common classes of independent covenants. (1) Covenants in which the acts to be done by each party are to be done at different times which do not necessarily bear any definite relation of priority each to the other.² Thus a covenant to construct a railroad is not a condition precedent to the payment of royalties, under a lease, which are to be paid beginning two months after possession is taken under the lease, while no part of the road is to be built till twelve months after possession is taken, part eighteen months after possession is taken, and another part six months after demand by the lessee.³ So where A gave to B his non-negotiable note, secured by mortgage, and B agreed in consideration thereof to satisfy certain debts due from A which were liens on the mortgaged realty, no time being fixed for such payment, B's covenant is independent and if broken is not the basis for a suit to cancel

¹⁹ Glenn v. Rochester, 156 N. Y. 161; 50 N. E. 785.

²⁰ Bohall v. Diller, 41 Cal. 532.

²¹ Hill v. Grigsby, 35 Cal. 656.

¹ Emigrant Company v. Adams County, 100 U. S. 61; Kauffman v. Raeder, 108 Fed. 171; 54 L. R. A. 247; 47 C. C. A. 278; Barr v. Little, 54 Neb. 556; 74 N. W. 850. "The agreement is an independent one.—a part of the consideration of the contract, it is true; but its non-performance raises an action merely

and does not annul the entire contract." Emigrant Company v. Adams County, 100 U. S. 61, 71.

² Wilks v. Smith, 10 M. & W. 355; Campbell v. Jones, 6 T. R. 570; Goldsborough v. Orr, 8 Wheat. (U. S.) 217; Central Appalachian Co. v. Buchanan, 73 Fed. 1006; Tronson v. Colby University, 9 N. D. 559; 84 N. W. 474.

³ Central Appalachian Co. v. Buchanan, 73 Fed. 1006.

the note for failure of consideration.⁴ So if covenants by a land company to build a side-track "promptly" to a certain factory, and when such factory was completed and in successful operation to buy certain stock, the first covenant is independent and the completion of the factory is not a condition precedent thereto.⁵ Thus A agreed to pay to B a certain note on February 15, 1819, under a contract, a consideration for which was B's promise to deliver to A a certain amount of lumber, one half in the year 1818 and the other half during the year 1819 as A should require it. It was held that inasmuch as A might require the lumber, deliverable in 1819, either all before the date on which the note came due, or all after that date, or part before and part after, his promise to pay the note was a covenant independent of B's covenant to deliver.⁶ If two acts are to be done at different times and there is a necessary priority of one over the other in point of time, performance of the prior covenant is a condition precedent to enforcing the later covenant. Thus if A agrees to complete a railroad for B by December first and B is then to give notes payable six months thereafter, A's performance is a condition precedent to B's liability.⁷ (2) A covenant by A which is only a part of the consideration for B's covenants is an independent covenant.⁸ Thus A sold land to B in consideration of which B (1) made a money payment, (2) agreed to introduce settlers, (3) reclaim lands, and (4) pay A's debt to X. Covenants (2), (3) and (4) were held to be independent.⁹ A leased to B, in consideration of which B was to (1) erect a building which cost twenty thousand dollars,

⁴ *Tronson v. Colby University*, 9 N. D. 559; 84 N. W. 474. For a similar case, except that the decision rests on the principle that B's covenant goes to part of the consideration only, see *Emigrant Company v. Adams County*, 100 U. S. 61.

⁵ *Southern Pine Fibre Co. v. Land Co.*, 53 Fed. 318.

⁶ *Goldsborough v. Orr*, 8 Wheat. (U. S.) 217.

⁷ *Slater v. Emerson*, 19 How. (U. S.) 224.

⁸ *Emigrant Company v. Adams County*, 100 U. S. 61; *Kauffman v. Raeder*, 108 Fed. 171; 54 L. R. A. 247; 47 C. C. A. 278; *Palmer v. Britannia Co.*, 188 Ill. 508; 59 N. E. 247.

⁹ *Emigrant Company v. Adams County*, 100 U. S. 61.

(2) pay rents which aggregated a hundred thousand dollars, (3) perform certain other covenants. The group of covenants numbered (3) were independent, and by reason of B's breach thereof A could not treat a covenant whereby he agreed to pay five thousand dollars for the building at the end of the term as discharged.¹⁰ A had leased a building to B. B wished to assign to X who was organizing a corporation. A and X agreed that A should release B from liability for rent, X would pay the rent at the end of the year, A would waive his right to eject for non-payment of rent, and X would assign to A a certain amount of stock in the new corporation which at a certain time A would reassign to X. The covenant to reassign is an independent covenant and a breach thereof does not discharge the contract.¹¹ A hired B to work for him in consideration of a carriage which A delivered to B and a certain sum per month. The covenant to pay wages was an independent covenant, breach of which did not discharge the contract as to B.¹² A agreed to deliver a certain number of logs to B to be sawed and to pay a certain price therefor. B agreed to saw them at that price and to saw for no other person during that season. B's sawing for others is a breach of an independent covenant, and if he saws all the logs furnished by A, A is not justified in treating the entire contract as ended and refusing to deliver more logs.¹³ (3) The covenant may be an absolute promise; that is, the contract may show that the party making such promise relied as the consideration thereof upon the promise of the adversary party and not upon the performance thereof. Covenants of this sort are independent of the promises made in consideration thereof, and a breach of the latter does not discharge the former.¹⁴

¹⁰ *Palmer v. Britannia Co.*, 188 Ill. 508; 59 N. E. 247.

¹¹ *Kauffman v. Raeder*, 108 Fed. 171; 54 L. R. A. 247; 47 C. C. A. 278.

¹² *Gould v. Brown*, 6 O. S. 538.

¹³ *Reindl v. Heath*, 115 Wis. 219; 91 N. W. 734.

¹⁴ *Bean v. Atwater*, 4 Conn. 3; 10

Am. Dec. 91; *Runkle v. Johnson*, 30 Ill. 328; 83 Am. Dec. 191; *Gillum v. Dennis*, 4 Ind. 417; *Hutchings v. Moore*, 4 Met. (Ky.) 110; *Clough v. Baker*, 48 N. H. 254; *Tracy v. Exchange Co.*, 7 N. Y. 472; 57 Am. Dec. 538; *Adrian v. Lane*, 13 S. C. 183; *Kettle v. Harvey*, 21 Vt. 301.

VII. FAILURE OF CONSIDERATION.

§1472. Failure of consideration.

If A, a party to a contract which is executory on his side, does not receive what he was promised by B in consideration for his promise, the question is presented whether A can use such facts as discharging him from liability upon his executory contract or whether he is still liable to B upon his covenants and his only remedy is an action against B for damages. If A can use such facts as a discharge, a failure of consideration is said to exist. Failure of consideration may assume either of two forms. (1) A may make his promise in consideration of an executory promise made to him by B and B's failure to perform such executory promise may then constitute the failure of consideration. (2) A may make his promise in consideration of the transfer to him by B of certain property or other legal rights which B agrees shall possess certain qualities and which proves not to possess such qualities. The doctrine of failure of consideration involves in some cases questions of fraud, misrepresentation or mistake. In other cases the question presented is primarily one of the power of equity to rescind contracts and conveyances.

§1473. Failure of consideration imports breach.

The very term "failure of consideration" imports that the party to whom the consideration moved has not received under the contract what it was agreed that he should receive. If he receives exactly what he has contracted for, and if he stipulated originally for a thing of value, he cannot avoid the contract because it does not prove as advantageous to himself as he had anticipated.¹ Thus A leased to B the privilege of displaying stereopticon advertisements on the roof and side-wall of A's building, at an agreed rent. Subsequently X, the owner of the building adjoining A's, leased his roof to another adver-

¹ *Taylor v. Riggs*, 1 Pet. (U. S.) N. C. 498; *Oakford v. Nixon*, 177 591; *Scott v. Scott*, 105 Ind. 584; Pa. St. 76; 34 L. R. A. 575; 35 Atl. 5 N. E. 397; *Johnston v. Smith*, 86 588.

tiser who put up a high screen which shut off the view of A's wall and roof. Such facts were not held to excuse B from paying rent.² So if A makes a mere speculative bargain, intending to take the risk of gain or loss, as where he buys a future dividend not yet declared,³ the fact that the risk results adversely to A does not amount to failure of consideration. So a contract of sale of a patent previously issued cannot be avoided where the vendee knows exactly what he is getting, though it proves of no value to him.⁴ Some cases, however, hold that if the patent proves to be worthless, failure of consideration exists.⁵ Some cases cited on this point are really decided on the ground of fraud.⁶ A contract for the sale of a patent protecting certain specified improvements is broken if letters patent are thereafter issued for only a small portion of the improvements specified and the application as to the rest of such improvements is rejected.⁷ In other cases it has been held that if the patented article is so useless as to avoid the patent, the consideration fails.⁸ In such case the tender of the letters patent by the vendee to the vendor places the latter *in statu quo*.⁹ If the patent is void, it fails as a consideration,¹⁰ even if the vendor of such right has warranted his right to sell and convey the same.¹¹

² Oakford v. Nixon, 177 Pa. St. 76; 34 L. R. A. 575; 35 Atl. 588.

³ Tayloe v. Riggs, 1 Pet. (U. S.) 591.

⁴ Johnson v. Linen Co., 33 Conn. 436; Hildreth v. Turner, 17 Ill. 184; Myers v. Turner, 17 Ill. 179; Detrick v. McGlone, 46 Ind. 291; Nash v. Lull, 102 Mass. 60; 3 Am. Rep. 435; Van Norman v. Barbeau, 54 Minn. 388; 55 N. W. 1112; Wilson v. Hentges, 26 Minn. 288; 3 N. W. 338; Jones v. Reynolds, 120 N. Y. 213; 24 N. E. 279; Fair v. Shelton, 128 N. C. 105; 38 S. E. 290; Tod v. Wick, 36 O. S. 370.

⁵ Bierce v. Stocking, 11 Gray (Mass.) 174; Clough v. Patrick, 37 Vt. 421.

⁶ Comings v. Ledy, 114 Mo. 454; 21 S. W. 804.

⁷ Hargraves v. Machinery Co., 19 R. I. 426; 34 Atl. 738.

⁸ Dickinson v. Hall, 14 Pick. (Mass.) 217; 25 Am. Dec. 390; Lester v. Palmer, 4 All. (Mass.) 145; Rowe v. Blanchard, 18 Wis. 441; 86 Am. Dec. 733.

⁹ Sandage v. Mfg. Co., 142 Ind. 148; 51 Am. St. Rep. 165; 34 L. R. A. 363; 41 N. E. 380.

¹⁰ Morrow v. Brown, 31 Ind. 378; Chemical, etc., Co. v. Howard, 150 Mass. 495; 148 Mass. 352; 28 N. E. 317; 20 N. E. 92; Earl v. Page, 6 N. H. 477; 26 Am. Dec. 711; Cowan v. Dodd, 3 Coldw. (Tenn.) 278.

¹¹ Dickinson v. Hall, 14 Pick. (Mass.) 217; 25 Am. Dec. 390.

§1474. Total failure a discharge.

In other cases the question primarily presented is one of the effect of non-performance of precedent concurrent or subsequent covenants. From this standpoint this topic must be divided into total and partial failure of consideration. Complete failure to perform an executory promise discharges the adversary party from performing his promise made in consideration thereof.¹ Failure of consideration avoids a promissory note not in the hands of a *bona fide* holder.² A note given for services to be performed thereafter, is discharged if not in the hands of a *bona fide* holder, if such services are not rendered.³ Notes given in consideration of water to be furnished for irrigation, are discharged if such water is not furnished when demanded. It is not necessary that the maker of such note should offer to release the payee from his agreement to furnish such water.⁴ If a note has been transferred before maturity to one who knows that the consideration therefor was an agreement by the payee to deliver coal, but who does not know that the payee will not perform such agreement, the indorsee may recover from the maker upon such note.⁵ Under a contract to exchange real estate, A agreeing to accept a lease back of the property conveyed by him, A's agreement to accept the lease is discharged by B's refusal to perform the contract where B falsely claims that the title to A's realty is defective.⁶ A agreed to release certain claims in consideration that his debtor, B, would not change a devise in a will previously executed by B. This contract is discharged by A's subsequently presenting such claims to the commissioners of B's

¹ *Missouri Pacific Ry. v. Yarnell*, 65 Ark. 320; 46 S. W. 943; *Russ Lumber Co. v. Muscupiabe, etc., Co.*, 120 Cal. 521; 65 Am. St. Rep. 186; 52 Pac. 995; *Fink v. Chambers*, 95 Mich. 508; 55 N. W. 375.

² *Sigworth v. Holcomb (Ia.)*, 79 N. W. 364; *Fink v. Chambers*, 95 Mich. 508; 55 N. W. 375.

³ *Hays v. Plummer*, 126 Cal. 107; 77 Am. St. Rep. 153; 58 Pac. 447;

Ray v. Moore, 24 Ind. App. 480; 56 N. E. 937.

⁴ *Russ, etc., Co. v. Water Co.*, 120 Cal. 521; 65 Am. St. Rep. 186; 52 Pac. 995.

⁵ *Tradesmen National Bank v. Curtis*, 167 N. Y. 194; 52 L. R. A. 430; 60 N. E. 429.

⁶ *Seannell v. Soda Fountain Co.*, 161 Mo. 606; 61 S. W. 889.

estate, although B does not offer to refund the money received in part consideration therefor.⁷ A contract to pay the debt of another, in consideration of forbearance of suit, is discharged if the original debtor is subsequently sued.⁸ An executory agreement for credit is discharged where the notes,⁹ given in consideration of such promise proved worthless. A contract for the sale of mining land, conditioned that the vendee shall, at a certain time, induce a corporation thereafter to be organized, to execute certain notes for the remainder of the purchase price, and a mortgage of such property to secure such notes, may be rescinded by the vendor if the notes and mortgage are not furnished.¹⁰

§1475. Total failure gives right to recover payments.

If money has been advanced, or property delivered for a consideration which has failed, the injured party may recover what he had paid under the contract.¹ Payment made in advance for support,² for irrigation,³ for corporate stock to be

⁷ White v. White, 68 Vt. 161; 34 Atl. 425.

⁸ Clark v. Russell, 3 Watts (Pa.) 213; 27 Am. Dec. 348.

⁹ Sheldon Axle Co. v. Scofield, 85 Mich. 177; 48 N. W. 511.

¹⁰ Tyler v. Cote, 29 Or. 515; 45 Pac. 800.

¹ Warnock v. Davis, 104 U. S. 775; Richter v. Stock Co., 129 Cal. 367; 62 Pac. 39; Herwig v. Richardson, 44 La. Ann. 703; 11 So. 135; Pugh v. Moore, 44 La. Ann. 209; 10 So. 710; Furgerson v. Staples, 82 Me. 159; 17 Am. St. Rep. 470; 19 Atl. 158; Slater v. Olson, 83 Minn. 35; 85 N. W. 825; Dennis v. Brewing Co., 80 Minn. 15; 82 N. W. 978; Anthony v. Sewing Machine Co., 16 R. I. 571; 5 L. R. A. 575; 18 Atl. 176; Williamson v. Johnson, 62 Vt. 378; 22 Am. St.

Rep. 117; 9 L. R. A. 277; 20 Atl. 279; Hughes v. Frum, 41 W. Va. 445; 23 S. E. 604. "When money is paid or a promise made by one party in contemplation of some act to be done by the other which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded on such consideration may be avoided between the parties to the contract." Griggs v. Austin, 3 Pick. (Mass.) 20, 22; 15 Am. Dec. 175; quoted. Hudson v. Archer, 9 S. D. 240, 245; 68 N. W. 541.

² Lathrop v. Mayer, 86 Mo. App. 355.

³ Richter v. Stock Co., 129 Cal. 367; 62 Pac. 39.

delivered,⁴ for the release of a lien,⁵ or for a saloon license,⁶ may be recovered if the consideration for which such payments were made fails totally. So a man who has paid money to a woman to enable her to prepare for her marriage with him under her contract, may recover such payments if she refuses to marry him.⁷ If A pays premiums on B's policy of life insurance under a contract whereby B has assigned such policy to A, and it is subsequently held that such assignment is invalid, A may recover such premiums from B's estate.⁸ If an entire contract is made to transport freight,⁹ or passengers,¹⁰ and through some accident the carrier after having effected transportation for part of the distance is unable to complete the contract, payments made in advance under such contract may be recovered. Failure to execute and deliver a mortgage which a builder had agreed to take in payment for his work does not entitle him to take possession of the building, of which the owner has already gone into peaceable possession, and to exclude the owner therefrom.¹¹ The assignee of a worthless instrument,¹² as of an instrument purporting to be a state bond which is not in fact a valid obligation,¹³ or of an instrument purporting to be a valid town order, which is thereafter held void,¹⁴ may in each case recover what he has paid therefor.

§1476. Recovery of payments on partial failure of consideration.

If partial failure of consideration exists, the right of the party not in default to recover what he has paid under the

⁴ *Anthony v. Sewing Machine Co.*, 16 R. I. 571; 5 L. R. A. 575; 18 Atl. 176.

⁵ *Slater v. Olson*, 83 Minn. 35; 85 N. W. 825.

⁶ *Dennis v. Brewing Co.*, 80 Minn. 15; 82 N. W. 978.

⁷ *Williamson v. Johnson*, 62 Vt. 378; 22 Am. St. Rep. 117; 9 L. R. A. 277; 20 Atl. 279.

⁸ *Warnock v. Davis*, 104 U. S. 775.

⁹ *Griggs v. Austin*, 3 Pick. (Mass.) 20; 15 Am. Dec. 175.

¹⁰ *Brown v. Harris*, 2 Gray (Mass.) 359.

¹¹ *Keystone Surgical Mfg. Co. v. Bate*, 187 Pa. St. 460; 41 Atl. 299.

¹² *Hughes v. Frum*, 41 W. Va. 445; 23 S. E. 604.

¹³ *Herwig v. Richardson*, 44 La. Ann. 703; 11 So. 135; *Pugh v. Moore*, 44 La. Ann. 209; 10 So. 710.

¹⁴ *Ferguson v. Staples*, 82 Me. 159; 17 Am. St. Rep. 470; 19 Atl. 158.

contract depends in the first instance on whether the consideration is by the terms of the contract so apportioned as to fix the amount paid for that part of the consideration which has failed, or not. If the consideration is so apportioned recovery can be had. If not so apportioned, the remedy of the party not in default is to sue on the contract.¹ Thus under a sale of a stock of goods in a store together with furniture and fixtures for a gross sum, no recovery can be had for money had and received on the theory of failure of consideration, if the title to the fixtures fails.² It has been said that the entire consideration may be recovered if the failure of consideration affects a vital term of the contract.³ Thus where a city donated money and subscribed for stock in a railroad on condition that the road should be constructed to the city and that the city should be the end of the division and the place of location of the machine shops, it was said that if the latter conditions were broken and the consideration could not be apportioned, the entire consideration could be recovered.⁴

§1477. Partial failure.— Full compensation in damages.

Partial failure of consideration is analogous to breach of an independent covenant. A partial failure of consideration does not discharge the entire contract if compensation therefor can be made in damages. Thus under a contract to erect a mill and maintain and operate it for five years and not to transfer it in that time, breach of the latter stipulation gives rise to an action for damages but does not entitle the adversary party to recover money paid, as a consideration for the contract.¹ Under a similar contract buildings were erected by a manufacturing company under a contract to remove their business, but the removal was never made. This was held to be a breach going to the essence of the contract, and recovery

¹ *Smart v. Gale*, 62 N. H. 62.

² *Smart v. Gale*, 62 N. H. 62.

³ *Missouri, etc., Ry. v. Ft. Scott*,
15 Kan. 435.

⁴ *Missouri, etc., Ry. v. Ft. Scott*,

15 Kan. 435.

¹ *Hudson v. Archer*, 9 S. D. 240;
68 N. W. 541.

could be had of money paid thereunder.² Under a contract for operating a brickyard, breach of a provision by which one party agrees to buy all his supplies of the other does not go to the essence of the contract and does not prevent him from recovering for what he has done.³ If the party who has performed in part cannot be placed *in statu quo*, the contract cannot be rescinded for partial failure of consideration. Under contract whereby A was to convey to B a certain tract of land in consideration whereof B agreed to (1) relinquish her right of appeal from a certain decree, and (2) quitclaim her interest in other property, a failure of title to the realty quitclaimed by B will not be a ground for rescinding the contract after B has lost her right of appeal.⁴ In some states a partial failure of consideration may be used as a partial defense in an action on the contract, even if the consideration is not apportioned and the damages are unliquidated.⁵ Thus in an action on a single bill given for several fillies, fraud as to their pedigree constituting partial failure of consideration may be set up.⁶ In other states a partial failure of consideration is not available as a defense to an action on the contract, though it may be the basis of an independent action.⁷

§1478. Partial failure.—Vital term.

* Where such compensation cannot be made, the effect of partial failure as discharge depends in part upon whether it goes to a vital term of the contract or not. If the failure of consideration affects a vital part of the contract, it operates as a discharge of the entire contract, including subsidiary provisions.¹ A contract whereby a city leases its waterworks to

² Ft. Wayne Electric Light Co. v. Miller, 131 Ind. 499; 14 L. R. A. 804; 30 N. E. 23.

³ Rioux v. Brick Co., 72 Vt. 148; 47 Atl. 406.

⁴ Mullreed v. Thumb, 119 Mich. 578; 78 N. W. 658.

⁵ Withers v. Green, 9 How. (U. S.) 213.

⁶ Withers v. Greene, 9 How. (U. S.) 213.

⁷ Thornton v. Wynn, 12 Wheat. (U. S.) 183.

¹ Kauffman v. Raeder, 108 Fed. 171; 54 L. R. A. 247; 47 C. C. A. 278; Parker v. Bond, 121 Ala. 529; 25 So. 898.

A, who has to operate it and keep the machinery in order, is discharged if A becomes habitually intoxicated and ruins the machinery. The city may rescind such contract, although it contains no forfeiture clause.² An agreement whereby a wife relinquishes all her rights in her husband's property, in consideration of her having the care and custody of her minor son, is discharged where her husband in his lifetime took such son from her by stealth, detained him during the husband's life, and sued his wife for a divorce, praying for the custody of such son. The wife can, therefore, assert her rights in her husband's estate upon his death.³ An electric light company made a contract with the citizens of a city to move their plant there, and to make an invoice with a guaranty that the invoice would show three hundred thousand dollars surplus above liabilities. In consideration of this, the Light Plant was to receive certain land and a bonus. The bonus was paid, and with it the company erected buildings upon the land, but the invoice was never made. This was held to be such failure of consideration as to entitle the parties who had paid the bonus to recover it.⁴ A owned a patent for a method of transferring wheat from one car to another and weighing it. He made a contract with a railroad company, whereby he was to erect his scales at a given point and transfer grain for the company, and they were to pay him therefor one half of the saving over the old system. After performance of the contract had begun, A gave information as to the weight of the corn to other parties, to the injury of the railroad. This was held to be sufficient breach to justify the railroad in treating the contract as discharged.⁵ A contract to sell a hotel, furniture and fixtures at a certain appraisement, the party refusing to accept the appraisement to forfeit a certain deposit, is discharged if the vendor prevents the vendee from being present at or taking any part in such appraisement.

² Mahon v. Columbus, 58 Miss. 131 Ind. 499; 14 L. R. A. 804; 30 310; 38 Am. Rep. 327. N. E. 23.

³ Bodwell v. Bodwell, 66 Vt. 101; ⁴ Lake Shore, etc., R. R. v. Richards, 152 Ill. 59; 30 L. R. A. 33; 38 Atl. 870.

⁵ Ft. Wayne, etc., Co. v. Miller, 38 N. E. 773.

The vendee may therefore recover the amount deposited.⁶ A note and mortgage given in consideration of money to B, loaned thereafter, may be canceled upon repayment of the amount actually loaned, where the lender refuses to advance the entire amount agreed upon.⁷

§1479. Failure of consideration for executed conveyance of realty.

Failure of consideration for an executed conveyance of realty gives the grantor no right at law to avoid his conveyance.¹ Whether a conveyance of realty can be rescinded in equity for failure of consideration, or whether the grantee can only maintain an action for breach of the contract in consideration of which the conveyance was made is a question upon which there is some divergence of judicial opinion. If A conveys to B on consideration that B will support A, and B does not furnish support, the weight of authority is that A may have rescission.² Rescission has been given where the grantee failed to give such support,³ as by making the grantor a public charge,⁴ or where he refuses to furnish it,⁵ and conveys to others the realty conveyed to him in consideration of such promise,⁶ or where on the death of the grantee his heirs refuse to furnish it.⁷ Such a conveyance may be set aside for cruel treatment of grantor,⁸

⁶ *Tibbetts v. Sartwell*, 67 N. H. 418; 29 Atl. 411.

⁷ *Payne v. Loan, etc., Co.*, 54 Minn. 255; 55 N. W. 1128.

¹ Contract for support. *McCardle v. Kennedy*, 92 Ga. 198; 44 Am. St. Rep. 85; 17 S. E. 1001.

² *McClelland v. McClelland*, 176 Ill. 83; 51 N. E. 559; *Dorsey v. Wolcott*, 173 Ill. 539; 50 N. E. 1015; *Kusch v. Kusch*, 143 Ill. 353; 32 N. E. 267; *Walker v. Walker*, 104 Ia. 505; 73 N. W. 1073; *Wilfong v. Johnson*, 41 W. Va. 283; 23 S. E. 730; *Glocke v. Glocke*, 113 Wis. 303; 57 L. R. A. 458; 89 N. W. 118; *Reoch v. Reoch*, 98 Wis. 201;

73 N. W. 989; *Morgan v. Loomis*, 78 Wis. 594; 48 N. W. 109; *Bogie v. Bogie*, 41 Wis. 209.

³ *Kusch v. Kusch*, 143 Ill. 353; 32 N. E. 267; *Reoch v. Reoch*, 98 Wis. 201; 73 N. W. 989.

⁴ *Potter v. Woodruff*, 92 Mich. 8; 52 N. W. 83.

⁵ *Wilfong v. Johnson*, 41 W. Va. 283; 23 S. E. 730.

⁶ *Wilfong v. Johnson*, 41 W. Va. 283; 23 S. E. 730.

⁷ *Cree v. Sherfy*, 138 Ind. 354; 37 N. E. 787; *Morgan v. Loomis*, 78 Wis. 594.

⁸ *Dodge v. Dodge*, 92 Mich. 109; 52 N. W. 296.

or harsh treatment,⁹ but not for slight annoyances.¹⁰ The fact that the consideration expressed in the deed is one dollar and love and affection,¹¹ or that the property conveyed was encumbered by a mortgage not mentioned in the deed but known to the grantee,¹² does not prevent such right of rescission. Such contracts are often complicated by questions of mental infirmity of the grantor,¹³ insanity of grantor,¹⁴ or undue influence exerted by the grantee,¹⁵ which makes the right of rescission still clearer. Equity may on giving rescission make allowance for permanent improvements made by the grantee,¹⁶ making him account for timber cut and removed.¹⁷ Equity may give compensation instead of rescission,¹⁸ making such compensation a lien upon the premises conveyed,¹⁹ and such lien must be superior to the interests of the remainder-men where grantor has conveyed to grantee for life, remainder to grantee's children.²⁰ A conveyance by a husband to a trustee for his wife's support in consideration of separation may be cancelled if cohabitation is resumed.²¹ In other cases, it seems to be held that equity will decree rescission only if special facts such as the insolvency of the grantee and his consequent inability to respond in damages²² exist. The grantor's remedy is said to be an action upon the contract.²³ So breach of a contract to establish and operate a manufacturing business upon realty conveyed in

⁹ As where the grantor is the grantee's mother. *Patterson v. Patterson*, 81 Ia. 626; 47 N. W. 768.

¹⁰ *Tuit v. Smith*, 137 Pa. St. 35; 20 Atl. 579.

¹¹ *Walker v. Walker*, 104 Ia. 505; 73 N. W. 1073.

¹² *McClelland v. McClelland*, 176 Ill. 83; 51 N. E. 559.

¹³ *Morgan v. Loomis*, 78 Wis. 594; 48 N. W. 109.

¹⁴ *Potter v. Woodruff*, 92 Mich. 8; 52 N. W. 83.

¹⁵ *Dorsey v. Wolcott*, 173 Ill. 539; 50 N. E. 1015.

¹⁶ *Morgan v. Loomis*, 78 Wis. 594; 48 N. W. 109.

¹⁷ *Morgan v. Loomis*, 78 Wis. 594; 48 N. W. 109.

¹⁸ *Boyden v. McRoberts*, 88 Mich. 134; 50 N. W. 115.

¹⁹ *FitzPatrick v. FitzPatrick*, 91 Mich. 394; 51 N. W. 1058.

²⁰ *Boyden v. McRoberts*, 88 Mich. 134; 50 N. W. 115.

²¹ *Smith v. King*, 107 N. C. 273; 12 S. E. 57.

²² *McCardle v. Kennedy*, 92 Ga. 198; 44 Am. St. Rep. 85; 17 S. E. 1001.

²³ *Gardner v. Knight*, 124 Ala. 273; 27 So. 298.

consideration of such contract does not entitle the grantor to rescission. His remedy is an action on the contract for damages.²⁴ Equity may refuse rescission but give compensation,²⁵ and make it a lien upon the realty.²⁶ A conveyance of realty made in consideration of a reconveyance,²⁷ or a devise thereof,²⁸ may be set aside for failure of consideration if such reconveyance or will is so defective as to be invalid. A conveyance made in consideration of a contract to devise cannot be rescinded unless specific performance proves impracticable.²⁹

§1480. Failure of title.—Executory contract to convey realty.

If a contract for the sale of realty is executory on both sides, failure of title is failure of consideration. The vendee may rescind and recover what he has paid on such contract¹ on surrendering possession to the vendor if the vendee has taken possession under the contract.² If the vendor renounces the contract the vendee may recover what he has paid in.³ So if the vendor has withdrawn his deed from escrow, contrary to the terms of the contract, the vendee may resist collection of his note for the property in the vendor's hands.⁴ So if the vendor conveys the realty to another, the vendee may resist the collection of notes given by him for the purchase price if not in the hands of a *bona fide* holder.⁵ If the vendor refuses to deliver a deed when called upon the vendee may rescind and

²⁴ *Piedmont, etc., Co. v. Machine Co.*, 96 Ala. 389; 11 So. 332.

²⁵ *Powers v. Powers* (Ky.), 39 S. W. 825.

²⁶ *Martin v. Martin* (Ky.), 20 S. W. 375.

²⁷ *Chapman v. Long*, 66 Vt. 656; 30 Atl. 3. (The grantee refused to make a new and valid reconveyance.)

²⁸ *Barker v. Smith*, 92 Mich. 336; 52 N. W. 723.

²⁹ *Riley v. Allen*, 54 N. J. Eq. 495; 35 Atl. 654.

¹ *Tupy v. Kocourek*, 66 Ark. 433;

51 S. W. 69; *Morris v. Goodwin*, 1 Ind. App. 481; 27 N. E. 985; *Blanck v. Sadlier*, 153 N. Y. 551; 40 L. R. A. 666; 47 N. E. 920; *Duncan v. Gisborn*, 17 Utah 209; 53 Pac. 1044.

² *Sayre v. Mohnhey*, 30 Or. 238; 47 Pac. 197.

³ *Elder v. Chapman*, 176 Ill. 142; 52 N. E. 10; reversing, 70 Ill. App. 288.

⁴ *Maydale v. Peterson*, 7 Ida. 502; 63 Pac. 1048.

⁵ *Battery Park Bank v. Loughran*, 126 N. C. 814; 36 S. E. 281.

recover the purchase price already paid in by him.⁶ A vendee in possession cannot have indemnity against incumbrances.⁷

§1481. Failure of title.—Executed conveyance of realty.

Upon the question whether a failure of title to realty which has been conveyed to the promisor is such a failure of consideration as to discharge a promise in consideration thereof there is a divergence of judicial opinion. Some courts hold that such failure of title is not failure of consideration, and that the grantee must perform the contract on his part, his remedy being an action for damages upon the covenants of the deed.¹ Accordingly, in the absence of special circumstances such as fraud, insolvency or non-residence of the grantor,² equity will not grant rescission.³ So failure of title cannot be interposed as a defense in an action for the purchase price.⁴ A breach of covenants of seisin,⁵ or of covenants against encumbrances,⁶ is not ground for rescission in equity. Therefore, if the vendor removes the defect in title,⁷ or if the

⁶ *Zimmerman v. Branyan*, 62 N. J. L. 478; 41 Atl. 689; *Duncan v. Gisborn*, 17 Utah 209; 52 Pac. 1044.

⁷ *Redfeld v. Woodfolk*, 22 How. (U. S.) 318.

¹ *Fields v. Clayton*, 117 Ala. 538; 67 Am. St. Rep. 189; 23 So. 530; *Barkhamstead v. Case*, 5 Conn. 528; 13 Am. Dec. 92; *Long v. Allen*, 2 Fla. 403; 50 Am. Dec. 281; *Laughery v. McLean*, 14 Ind. 106; *Harrison v. Palo Alto County*, 104 Ia. 383; 73 N. W. 872; *Lloyd v. Jewell*, 1 Me. 352; 10 Am. Dec. 73.

² *Fields v. Clayton*, 117 Ala. 538; 67 Am. St. Rep. 189; 23 So. 530; *Abner v. York* (Ky.), 41 S. W. 309; *Egan v. Yeaman* (Tenn. Ch. App.), 46 S. W. 1012. Even in case of innocent misrepresentation in some states. *Abner v. York* (Ky.), 41 S. W. 309.

³ *Fields v. Clayton*, 117 Ala. 538;

67 Am. St. Rep. 189; 23 So. 530; *Parker v. Parker*, 93 Ala. 80; 9 So. 426; *Meeks v. Garner*, 93 Ala. 17; 8 So. 378; *Murkett v. Munford*, 70 Ala. 423; *Abner v. York* (Ky.), 41 S. W. 309; *Earle v. De Witt*, 6 All. (Mass.) 520; *Fellows v. Evans*, 33 Or. 30; 53 Pac. 491; *Stokes v. Acklen* (Tenn. Ch. App.), 46 S. W. 316.

⁴ *Patton v. Taylor*, 7 How. (U. S.) 132; *Lafarge v. Mathews*, 68 Ill. 328; *Wimberg v. Schwegeman*, 97 Ind. 528; *Slocum v. Bracy*, 55 Minn. 249; 43 Am. St. Rep. 499; 56 N. W. 826; *Leird v. Abernathy*, 10 Heisk. (Tenn.) 626; *Tarleton v. Daily*, 55 Tex. 95.

⁵ *McLennan v. Prentice*, 85 Wis. 427; 55 N. W. 764.

⁶ *Anderson v. Land Co.*, 96 Va. 257; 31 S. E. 82.

⁷ *Building, etc., Co. v. Fray*, 96 Va. 559; 32 S. E. 58.

liens which formed a cloud upon the title are barred by limitations,⁸ rescission cannot be had. If the vendee has not exacted proper covenants to protect him, no relief can be given.⁹ The same result follows where he has required warranties but the covenants of warranty are *ultra vires* because the grantor is a county.¹⁰ In some cases this view is based on the theory that the interest of one in possession is a sufficient consideration,¹¹ and if the vendee wishes to do more than purchase the vendor's interest he should stipulate therefor. Other authorities hold that a failure of title is a failure of consideration which discharges the vendee from performance.¹² Thus if the grantor breaks his contract to furnish an abstract showing a complete title, the grantee may tender a reconveyance and defeat an action for the purchase money even if he is in undisturbed possession under a warranty deed.¹³ If the vendee does not tender reconveyance he cannot recover the purchase money in the action of assumpsit.¹⁴ In other cases it is held that if the vendee has been placed in possession of the realty he can rescind for failure of title and defeat recovery on the purchase money notes,¹⁵ only if there are special facts, such as fraud on the part of the vendor, or insolvency or non-residence.

§1482. Failure of consideration in sales of personalty.

A sale of a chattel in possession of the vendor implies a warranty of title in the absence of a specific agreement to the contrary. In case of total failure of title to a chattel which is the subject-matter of a contract, failure of consideration exists, and if the adversary party has paid for such chattel he may

⁸ Egan v. Yeaman (Tenn. Ch. App.), 46 S. W. 1012.

⁹ Union Pacific Ry. v. Barnes, 64 Fed. 80; Woodbury v. Evans, 122 N. C. 779; 30 S. E. 2.

¹⁰ Harrison v. Palo Alto County, 104 Ia. 383; 73 N. W. 872.

¹¹ Carrier v. Eastis, 112 Ala. 474; 20 So. 595.

¹² Cook v. Mix, 11 Conn. 432;

Slack v. McLagan, 15 Ill. 242; Rice v. Goddard, 14 Pick. (Mass.) 293; Durment v. Tuttle, 50 Minn. 426; 52 N. W. 909.

¹³ Loring v. Oxford, 18 Tex. Civ. App. 415; 45 S. W. 395.

¹⁴ Wilson v. Breyfogle, 63 Fed. 379; 11 C. C. A. 248.

¹⁵ Black v. Walker, 98 Ga. 31; 26 S. E. 477.

recover the purchase money.¹ If several chattels have been sold by an indivisible contract, it has been held in case of a failure of title to a part of such chattels that a *pro rata* recovery of the purchase price may be had.² This principle seems contrary to the analogy of the law. Recovery should be had for the value of the chattel which may be more or less than a *pro rata* part of the purchase price. In an executed contract of sale there is, as a rule, no implied warranty of quality, and in the absence of such warranty the vendee is without remedy for defects in quality.³ If a contract provides for passing the title to chattels in the future and there is an express or implied warranty as to quality the question arises whether tender of a chattel which does not possess such qualities operates as a discharge of such contract or whether the only remedy of the vendee is an action for damages. The determination of this question turns on the further question whether the parties were contracting for transfer of title to a specific existing chattel or not. If they were contracting with reference to a specific existing chattel, tender of such chattel is a performance of the contract, and the fact that it does not possess the qualities agreed upon does not discharge the contract but merely gives the vendee a right of action for damages. If they were contracting, not with reference to a specific existing chattel, but for undetermined chattels, to conform to a given description or to correspond to a given sample, tender of chattels not possessing the qualities specified discharges the contract.⁴ In case of tender of a chattel under an executory contract

¹ *Ledwich v. McKim*, 53 N. Y. 307; *Wilkinson v. Ferree*, 24 Pa. St. 190.

² *Moorhead v. Davis*, 92 Ind. 303.

³ *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; *Horner v. Parkhurst*, 71 Md. 110; 17 Atl. 1027; *Hight v. Bacon*, 126 Mass. 10; 30 Am. Rep. 639; *Mixer v. Coburn*, 11 Met. (Mass.) 559; 45 Am. Dec. 230; *McCray Refrigerator Co. v. Woods*, 99 Mich. 269; 41 Am. St. Rep. 599; 58

N. W. 320; *Dickson v. Jordan*, 11 Ired. (N. C.) L. 166; 53 Am. Dec. 403; *Lord v. Grow*, 39 Pa. St. 88; 80 Am. Dec. 504; *Scott Lumber Co. v. Mfg. Co.*, 91 Wis. 667; 65 N. W. 513; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120; 41 Am. St. Rep. 33; 58 N. W. 232.

⁴ *Pope v. Allis*, 115 U. S. 363; *Ripley v. Case*, 78 Mich. 126; 18 Am. St. Rep. 428; 43 N. W. 1097; *McCormick Harvesting Machine Co.*

of sale, which does not conform to the terms of the contract as to kind or quality, the vendee may reject it, and treat the tender as a breach.⁵ If the title to a chattel has passed, but the chattel does not possess the qualities which it was agreed that it should have, the question arises whether the vendee may avoid the contract and resist payment of the purchase price if the contract is still executory on his part; or whether he may only sue for damages; or whether he has an election between these two remedies. In some jurisdictions the vendee may treat a breach of warranty as a discharge of the contract, and resist payment of the purchase price if the contract is executory on his part, or recover what he has already paid under it.⁶ To exercise this right the vendee must return what he has received under the contract.⁷ Other cases hold that the vendee can only recoup damages, such breach not amounting to a discharge.⁸ Whether the invalidity of a patent amounts to failure of consideration is a question on which there

v. Knoll, 57 Neb. 790; 78 N. W. 394; Meader v. Cornell, 58 N. J. L. 375; 33 Atl. 960; Smith v. Mfg. Co., 58 N. J. L. 242; 33 Atl. 244.

⁵ St. Louis Paper Box Co. v. Hubinger Bros. Co., 100 Fed. 595; 40 C. A. 577; Hallwood Cash Register Co. v. Lufkin, 179 Mass. 143; 60 N. E. 473; Smith v. Mfg. Co., 58 N. J. L. 242; 33 Atl. 244; Cohen v. Platt, 69 N. Y. 348; 25 Am. Rep. 203; Virginia Carolina Chemical Co. v. Carpenter, 99 Va. 292; 38 S. E. 143.

⁶ Timken Carriage Co. v. Smith, 123 Ia. 554; 99 N. W. 183; McCormick Harvesting Machine Co. v. Brower, 94 Ia. 144; 62 N. W. 700; Aultman v. Trainer, 80 Ia. 451; 45 N. W. 757; Toledo Savings Bank v. Rathmann, 78 Ia. 288; 43 N. W. 193; Gale, etc., Co. v. Stark, 45 Kan. 606; 23 Am. St. Rep. 739; 26 Pac. 8; French v. Gordon, 10 Kan. 370; Libby v. Haley, 91 Me. 331; 39 Atl. 1004; Milliken v. Skillings, 89 Me. 180; 36 Atl. 77; Smith v.

Hale, 158 Mass. 178; 35 Am. St. Rep. 485; 33 N. E. 493; Morse v. Brackett, 98 Mass. 205; Bryant v. Isburgh, 13 Gray (Mass.) 607; 74 Am. Dec. 655; Compton v. Parsons, 76 Mo. 455; Aultman, Miller & Co. v. Hunter, 82 Mo. App. 632; Punt-enney-Mitchell Mfg. Co. v. North-wall Co., — Neb. —; 91 N. W. 863; Selig v. Rehfuß, 195 Pa. St. 200; 45 Atl. 919; Merrill v. Nightingale, 39 Wis. 247.

⁷ Massillon, etc., Co. v. Schirmer (Ia.), 93 N. W. 599.

⁸ Street v. Blay, 2 B. & Ad. 456; Lyon v. Bertram, 20 How. (U. S.) 149; Trumbull v. O'Hara, 71 Conn. 172; 41 Atl. 546; Hoover v. Sidener, 98 Ind. 290; H. W. Williams Transportation Line v. Transportation Co., 129 Mich. 209; 56 L. R. A. 939; 88 N. W. 473; Lynch v. Curfman, 65 Minn. 170; 68 N. W. 5; Allen v. Anderson, 3 Humph. (Tenn.) 581; 39 Am. Dec. 197; Hoadley v. House, 32 Vt. 179; 76 Am. Dec. 167.

is a conflict of authority. The English courts hold that it does not amount to failure of consideration.⁹ The American courts hold that the invalidity of a patent issued by the United States amounts to a failure of consideration,¹⁰ though where the patent is an English one, the view of the English courts has been taken.¹¹

VIII. ENTIRE AND SEVERABLE CONTRACTS.

§1483. Entire and severable contracts.—Importance of distinction.

The effect of a breach of one of a number of covenants in a contract, as discharge of the whole contract, depends upon whether such covenants in effect make one entire contract or a number of distinct contracts. Stating it in other words, the question is whether the contract is entire or severable. The question whether a contract is entire or severable arises in several different connections: (1) If one covenant of a contract is illegal, we have seen already¹ that the validity of the remaining covenants depends on whether the contract is entire or severable, the remaining covenants being valid if the contract is severable and unenforceable if the contract is entire. Thus a contract of employment at a gross compensation for a certain period of time which specifically includes Sundays is an entire contract and no recovery thereunder can be had for work done on secular days.² If a covenant is severable it may be enforced if itself legal, though it is joined with illegal covenants.³ (2)

⁹ *Adie v. Clark*, L. R. 3 Ch. Div. 134; *Hall v. Conder*, 2 C. B. N. S. 22; *Lawes v. Purser*, 6 El. & Bl. 930.

¹⁰ *Harlow v. Putnam*, 124 Mass. 553; *Nash v. Lull*, 102 Mass. 60; 3 Am. Rep. 435.

¹¹ *Chemical, etc., Co. v. Howard*, 150 Mass. 495; 2 L. R. A. 168; 23 N. E. 317.

¹ See § 509.

² *Stewart v. Thayer*, 168 Mass. 519; 60 Am. St. Rep. 407; 47 N. E. 420; *Handy v. Publishing Co.*, 41 Minn. 188; 16 Am. St. Rep. 695; 4 L. R. A. 466; 42 N. W. 872; *McClanathan v. Friedel*, 85 Hun (N. Y.) 175.

³ *Robertson v. Hayes*, 83 Ala. 290; 3 So. 674; *Glaze v. Duson*, 40 La. Ann. 692; 4 So. 861.

In cases arising under the statute of frauds, the enforceability of the contract may depend upon whether it is entire or severable.⁴ Under this statute this question may come up at least in two different ways: (a) If the contract is oral, and some of the covenants are within the statute of frauds, the remaining covenants are unenforceable if the contract is entire,⁵ but enforceable if the contract is severable.⁶ (b) Under the section of the statute which concerns the sale of personal property, the question whether the contract is entire or not is important where the different articles sold are each below the price fixed by the statute for its operation but the aggregate price exceeds such limit. In this case, if the contract is severable, it can be proved orally, but if entire, the statute of frauds applies, and the contract cannot be proved unless that section has been complied with.⁷ If personal property is delivered in part, as provided for by the seventeenth section of the statute of frauds, the whole contract is enforceable, if entire; while if severable, only that part of it under which such delivery is made is enforceable.⁸ (3) The question whether a contract is entire or severable is important in determining questions of performance where one covenant has been broken. Subject to the principles which control the right of the parties after breach, no recovery can be had on the covenants of an entire contract by the party who has broken one of them.⁹ Thus A, the owner of timber, agreed to cut and haul it to B's mill and there to make it into lumber, and pile it in B's yard. B was by the contract then to pay six dollars a thousand feet therefor. This was so far entire that A could recover nothing for cutting and hauling, where the logs were burned before they were made into timber.¹⁰ If, on the other hand, the contract is severable,

⁴ See § 753.

⁵ *In re Kessler's Estate*, 87 Wis. 660; 41 Am. St. Rep. 74; 59 N. W. 129.

⁶ *Lowman v. Sheets*, 124 Ind. 416; 7 L. R. A. 784; 24 N. E. 351.

⁷ See § 753.

⁸ *Weeks v. Crie*, 94 Me. 458; 80 Am. St. Rep. 410; 48 Atl. 107.

⁹ *Easton v. Jones*, 193 Pa. St. 147; 44 Atl. 264; *Martin v. Fridenberg*, 169 Pa. St. 447; 32 Atl. 429; *Widman v. Gay*, 104 Wis. 277; 80 N. W. 450; *McDonald v. Bryant*, 73 Wis. 20; 40 N. W. 665.

¹⁰ *McDonald v. Bryant*, 73 Wis. 20; 40 N. W. 665.

it is in legal effect a number of distinct contracts; and a breach of one covenant does not operate as a discharge of other covenants between the same parties.¹¹ Thus if two parties enter into two contracts at the same time, by one of which A sells a certain mine to B, in consideration of a certain portion of the net proceeds, and by the other of which B agrees to hire A as superintendent of a mine for a certain period of time, a breach by the employer, of the contract of employment, does not amount to a breach of the contract concerning payment of the net proceeds.¹² So if two parties enter into contracts, by one of which A and B agree to form a stock company to manufacture machines, and by the other of which A guarantees that the machine manufactured can be placed on the market at a certain price, and the contracts are severable contracts, a breach of the contract of guarantee is not a breach of the contract for the organization of the corporation so as to justify abandonment thereof by the other party.¹³ So the party not in default may treat default as discharging one branch of a severable contract without seeking to avoid it all. Under an agreement to use "say ten thousand dollars" of certain negotiable paper, the discounting of three notes amounting to more than eleven thousand dollars constitutes severable contracts. Accordingly, the party who is to discount the notes is discharged as to one of the notes to be discounted if the maker is insolvent; and he may avoid such contract, recovering what he has paid thereunder.¹⁴

§1484. Intention of parties paramount.

In determining whether a contract is entire or severable, the intention of the parties is paramount,¹ and, if this intention is

¹¹ *Katz v. Bedford*, 77 Cal. 319; 1 L. R. A. 826; 19 Pac. 523; *McGrath v. Cannon*, 55 Minn. 457; 57 N. W. 150; *Burwell, etc., Co. v. Wilson*, 57 Neb. 396; 77 N. W. 762; *Hutchens v. Sutherland*, 22 Nev. 363; 40 Pac. 409; *Ming v. Corbin*, 142 N. Y. 334; 37 N. E. 105; *Solenger v. Gilbert*, 86 Va. 778; 11 S. E. 789.

¹² *Hutchens v. Sutherland*, 22 Nev. 363; 40 Pac. 409.

¹³ *Macklem v. Fales*, 130 Mich. 66; 89 N. W. 581.

¹⁴ *Bank v. Trust Co.*, 149 Ill. 343; 23 L. R. A. 611; 36 N. E. 1029.

¹ *Loud v. Water Co.*, 153 U. S. 564; *Pollak v. Electric Association*, 128 U. S. 446; *Lambie v. Steel Co.*, 118 Ala. 427; 24 So. 108; *Huyett*,

clearly expressed, no question can arise as to which class of contract it is. This intention is, however, often not clearly expressed, as the parties have generally no clear idea whether the contract is entire or severable, and no definite idea of the legal consequences which would follow from its being in either class. The intention of the parties must therefore be deduced from the language used by the application of the ordinary rules of construction.² The rules of construction are applied differently, however, in the different classes of cases in which the question whether the contract is entire or severable may arise. If this question arises in connection with the illegality of one covenant, the general principle applies that the courts will uphold a contract, if, by fair construction, it is possible to do so, rather than overthrow it. Accordingly, the test chiefly relied upon in such cases, is whether the parties have apportioned the consideration on the one side to the different covenants on the other, one of which covenants is illegal. If the consideration is apportioned so that for each covenant there is a corresponding consideration, the contract is severable, and the illegality of one covenant does not make the rest unenforceable.³ If, on the other hand, the consideration is not apportioned, and the same consideration supports a legal and illegal covenant, the contract is entire, and is already unenforceable.

§1485. Construction as to performance.

If the question involved is one of performance, the courts approach the problem without any desire, either to treat it as entire or severable. If the covenants are contained in different

etc., *Co. v. Edison Co.*, 167 Ill. 233; 59 Am. St. Rep. 272; 47 N. E. 384; *Shinn v. Bodine*, 60 Pa. 182; 100 Am. Dec. 560; *Barnes v. Coal Co.*, 101 Tenn. 354; 47 S. W. 498.

² "The question whether a contract is entire or divisible, in respect of the question of payment of the consideration cannot be solved by the application of any fixed legal standard. It depends upon the in-

tention of the parties to be gathered from all circumstances surrounding the agreement and from the face of the contract if in writing. It is quite as much, as a rule, a question of fact as of law, particularly where the terms of the agreement rest in parol." *State v. Davis*, 53 N. J. L. 144, 147; 20 Atl. 1080.

³ See § 509.

instruments, the courts incline to treat them as severable.¹ If the covenants are contained in one instrument, it is by no means conclusive that they form an entire contract.² The question to be determined is, whether the parties have, by the language employed, shown their intention to perform each covenant without reference to the performance on the one side, unless all the covenants were performed upon the other. In determining the application of this rule, the question is not whether the subject-matter can in fact be severed, but whether the parties intended it to be severed.³ Thus a contract to sell eight hundred thousand feet of lumber at seven dollars and twenty-five cents per thousand,⁴ or to remove all the dirt upon certain lots described, above a certain grade, being two thousand yards more or less, at six cents a cubic foot,⁵ or to construct a heating plant, the materials and labor necessary for which were each separately valued by the parties,⁶ or to remove several buildings,⁷ are each entire contracts, although it is possible to sever the subject-matter. Accordingly, performance of part of such contract gives no right of action upon the contract to the party so performing unless he has substantially performed the entire contract. A contract of employment for a certain length of time at a compensation payable at certain

¹ *Pittsburg, etc., Ry. v. Bridge Co.*, 155 U. S. 156; *Howell v. Moores*, 127 Ill. 67; 19 N. E. 863; *Hemenway v. Burnham*, 90 Mich. 227; 51 N. W. 276; *Kirtz v. Peek*, 113 N. Y. 222; 21 N. E. 130; *Hennershotz v. Gallagher*, 124 Pa. St. 1; 16 Atl. 518. In most cases of this sort the question whether such covenants are dependent or independent is also presented. The courts prefer to regard such covenants as independent.

² *Pierson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831; 22 N. E. 349.

³ *Morris v. Wibaux*, 159 Ill. 627; 43 N. E. 837. "The entirety of a contract depends on the intention of

the parties and not on the divisibility of the subject. The severable nature of the latter may often assist in determining the intention but will not overcome the intent to make an entire contract when that is shown." *Shinn v. Bodine*, 60 Pa. St. 182, 185; 100 Am. Dec. 560; quoted in *Easton v. Jones*, 193 Pa. St. 147, 149; 44 Atl. 264.

⁴ *Easton v. Jones*, 193 Pa. St. 147; 44 Atl. 264.

⁵ *Widman v. Gay*, 104 Wis. 277; 80 N. W. 450.

⁶ *Riddell v. Ventilating Co.*, 27 Mont. 44; 69 Pac. 241.

⁷ *Green v. Hanson*, 89 Wis. 597; 62 N. W. 408.

intervals, is an entire contract within the application of these rules.⁸ A contract to work until a certain "crop should be gathered" is an entire contract.⁹ Accordingly, an employe who breaks such contract, cannot recover anything on the contract for services already rendered thereunder.¹⁰ Equity will not give him relief.¹¹ A contract to work as a gardner for one year at fifty-five dollars a month, from March to November, and fifty dollars a month from then to March first, is an entire contract, and if it is renewed from year to year the employer cannot during the year discharge the employe even on notice of a month or more.¹² Under an entire contract for the sale of a specified quantity of goods, the vendee is not obliged to accept less than the quantity contracted for.¹³ Whether the contract in question is found in one instrument or in two or more different instruments, is not conclusive as to whether it is entire or severable. On the one hand, the contract found in one instrument may contain two or more severable covenants. On the other hand, an entire contract may be made up of two or more instruments.¹⁴ Thus a note and a separate contemporaneous instrument, giving to the maker of the note the right to surrender one hundred shares of certain stock within four months and discharge the note, make together an entire contract.¹⁵ So two instruments, one of which provides for the sale of a place of business and stock of goods, and the other of which provides that the vendor will not compete in business for a certain period, constitute together an entire contract.¹⁶ Separate instruments executed at the same time, but containing no reference each to the other, and supported

⁸ *Galveston County v. Ducie*, 91 Tex. 665; 45 S. W. 798.

⁹ *Timberlake v. Thayer*, 71 Miss. 279; 24 L. R. A. 231; 14 So. 446.

¹⁰ *Timberlake v. Thayer*, 71 Miss. 279; 24 L. R. A. 231; 14 So. 446.

¹¹ *Mallory v. Mackaye*, 92 Fed. 749; 34 C. C. A. 653.

¹² *Larkin v. Hecksher*, 51 N. J. L. 133; 3 L. R. A. 137; 16 Atl. 703.

¹³ *Crowl v. Goodenberger*, 112 Mich. 683; 71 N. W. 485; *Equitable*

Mfg. Co. v. Engelke, 68 N. J. L. 567; *sub nomine*, *Price v. Engelke*, 53 Atl. 698.

¹⁴ *Meyer v. Labau*, 51 La. Ann. 1726; 26 So. 463; *American, etc., Machine Co. v. Wood*, 90 Me. 516; 43 L. R. A. 449; 38 Atl. 548.

¹⁵ *American, etc., Machine Co. v. Wood*, 90 Me. 516; 43 L. R. A. 449; 38 Atl. 548.

¹⁶ *Meyer v. Labau*, 51 La. Ann. 1726; 26 So. 463.

by separate considerations, are separate and not entire contracts. Thus four contracts, each providing for the sale of a distinct section of land, entered into at the same time, but containing no reference each to the other, constitute separate contracts.¹⁷ So a non-negotiable note, and a contract whereby the payee binds himself to his assignee for the payment thereof are separate contracts.¹⁸

§1486. Apportionment of consideration.

In determining questions of performance the fact that several covenants are each supported by a distinct consideration, which consideration is thus separately apportioned, is often enough to show that the covenants are severable.¹ Thus a contract to erect a certain number of houses, at a fixed price for each house, contains severable covenants.² However, a contract to do certain work on four houses at a lump sum, specifying, however, the price estimated for each separate house, has been held to be an entire contract, and a recovery for breach thereof is a bar to subsequent actions thereon.³ A contract to sell a number of articles at a price fixed for each is usually a severable contract.⁴ A contract to make a sample machine and thirty others according to sample, the buyer to pay a certain sum for the sample machine "when delivered complete as per agreement," and a like sum for every other machine, is a severable contract.⁵ A contract whereby a railroad company agrees to construct a railroad in six distinct sections, and the county agrees to issue certain bonds of par-

¹⁷ Clark v. Newmann, 56 Neb. 374; 76 N. W. 892.

¹⁸ Barry v. Wachosky, 57 Neb. 534; 77 N. W. 1080.

¹ Keeler v. Clifford, 165 Ill. 544; 46 N. E. 248; McDaniels v. Whitney, 38 Ia. 60; Hill v. Rewee, 11 Met. (Mass.) 268; Burwell, etc., Co. v. Wilson, 57 Neb. 396; 77 N. W. 762; Pierson v. Crooks, 115 N. Y. 539; 12 Am. St. Rep. 831; 22 N. E. 349; McLaughlin v. Hess, 164

Pa. St. 570; 30 Atl. 491; Scofield v. Grow, 63 Vt. 283; 22 Atl. 457.

² Barnard v. McLeod, 114 Mich. 73; 72 N. W. 24.

³ Broxton v. Nelson, 103 Ga. 327; 68 Am. St. Rep. 97; 30 S. E. 38.

⁴ Young, etc., Co. v. Wakefield, 121 Mass. 91; Pierson v. Crooks, 115 N. Y. 539; 12 Am. St. Rep. 831; 22 N. E. 349.

⁵ Flather v. Machine Co., 71 N. H. 398; 52 Atl. 454.

ticular numbers, to be used in payment of each separate section, is a severable contract. Accordingly, if the county refuses to issue bonds for one of such sections because the entire amount would exceed the constitutional limit of indebtedness, the rest of such contract is not thereby discharged.⁶ A contract to make a sidewalk "ten feet wide and — feet long," the length not being specified, is not an entire contract for the number of feet intended by the parties, and recovery can be had thereunder for work done.⁷ A contract to issue annual railroad passes for the life of the promisee has been held to be a severable contract as to each pass, so that a separate action can be brought for each breach.⁸ It is, as has been said before,⁹ possible for one consideration to support two or more covenants.¹⁰ The fact that several covenants are supported by an entire consideration not apportioned to each is often sufficient to show that the contract is entire.¹¹ A contract to sell a number of articles at a gross price for all is generally inseverable.¹² A contract to convey three separate tracts of property,¹³ or to lumber several different sections of land,¹⁴ is an entire contract. A contract to decorate the walls of a room, to construct the woodwork, and to furnish the room, for a lump sum, is an entire contract.¹⁵ A contract whereby A agrees that B, during his first ten years' occupancy of certain premises, shall be exempt from borough taxation, and shall be

⁶ *Crogster v. Bayfield County*, 99 Wis. 1; 74 N. W. 635; 77 N. W. 167.

⁷ *Katz v. Bedford*, 77 Cal. 319; 1 L. R. A. 826; 19 Pac. 523.

⁸ *Curry v. Ry.*, 58 Kan. 6; 48 Pac. 579.

⁹ See § 278.

¹⁰ *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459; *Mississippi River Logging Co. v. Robson*, 69 Fed. 773; 16 C. C. A. 400; *Bates Machine Co. v. Bates*, 192 Ill. 138; 61 N. E. 518; *Bank v. Rowlinson*, 2 Kan. App. 82; 43 Pac. 304; *House v. Jackson*, 24 Or. 89; 32 Pac. 1027; *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210; 90 Am. St. Rep.

627; 58 L. R. A. 227; 51 Atl. 973; *Rhoades v. R. R.*, 49 W. Va. 494; 87 Am. St. Rep. 826; 55 L. R. A. 170; 39 S. E. 209.

¹¹ *Lee v. Briggs*, 99 Mich. 487; 58 N. W. 477; *Johnston v. Trask*, 116 N. Y. 136; 15 Am. St. Rep. 394; 5 L. R. A. 630; 22 N. E. 377.

¹² *Miner v. Bradley*, 22 Pick. (Mass.) 457.

¹³ *Martin v. Fridenberg*, 169 Pa. St. 447; 32 Atl. 429.

¹⁴ *Lee v. Briggs*, 99 Mich. 487; 58 N. W. 477.

¹⁵ *Pitcairn v. Phillip Hiss Co.*, 113 Fed. 492; 51 C. C. A. 323.

supplied with water for the use of his business at a cost not exceeding one hundred dollars a year, is an entire contract.¹⁶ A contract whereby a broker agrees to buy bonds for a customer, and to take them off his customer's hands at any time is entire.¹⁷ An offer of a reward for the arrest of two criminals is entire and no recovery can be had for the arrest of one.¹⁸ While the presence or absence of apportionment of consideration is of great importance in determining whether the contract is entire or severable, as far as questions of performance are concerned, it is not always conclusive. The language of the contract may show that although the consideration is apportioned, the parties may have intended that it should be performed as an entirety. Thus a contract for the sale of a certain amount of coal at a certain price per ton, to be shipped in installments,¹⁹ or a contract by a state to sell a tract of one hundred sixty acres at one dollar per acre,²⁰ each constitute an entire contract. A contract for transporting a number of barrels of salt at a certain price per barrel,²¹ is an entire contract. A contract of partnership for a term of five years, one partner to furnish the use of a mill and the capital, and the other to devote his entire time, ability, and energy to the business, and to render monthly accounts, is an entire contract.²² A lease for a specified term, at a specified monthly rental, has been held to be severable in so far that a recovery of an installment of rent due and unpaid is not a bar to an action to recover installments which subsequently fall due.²³ If the consideration is in part apportioned and in part entire the contract is entire. Thus a contract by a county to sell four hundred twelve acres of land at one dollar and twenty-five cents per

¹⁶ *Phoenix Silk Mfg. Co. v. Reilly*, 187 Pa. St. 526; 41 Atl. 523.

¹⁷ *Johnston v. Trask*, 116 N. Y. 136; 15 Am. St. Rep. 394; 5 L. R. A. 630; 22 N. E. 377.

¹⁸ *Blain v. Express Co.*, 69 Tex. 74; 6 S. W. 679.

¹⁹ *Providence Coal Co. v. Cox*, 19 R. I. 380; 35 Atl. 213.

²⁰ *State v. Jones*, 21 Nev. 510; 34 Pac. 450.

²¹ *Warehouse, etc., Co. v. Galvin*, 96 Wis. 523; 65 Am. St. Rep. 57; 71 N. W. 804.

²² *Cockley v. Brucker*, 54 O. S. 214; 44 N. E. 590.

²³ *Barnes v. Coal Co.*, 101 Tenn. 354; 47 S. W. 498.

acre and to release the rest of its swamp land claim is entire.²⁴ Even where the consideration is not apportioned, the context may show that the parties did not intend performance as an entirety. Thus a contract for the sale of a separator and an engine for a lump sum, but with separate warranties for each, the contract providing that the warranties as to one shall not apply to the other, or in any way affect the purchase price of the other, is a severable contract so that the vendee cannot rescind the entire contract for a breach of the warranty as to the engine.²⁵

§1487. Breach of employment contracts.

A contract of employment for a fixed term, the compensation to be paid in installments at certain intervals during the term of employment, is usually held to be entire, so that in case of breach by the employe, no recovery can be had on the contract.¹ If compensation is not payable at intervals the contract is even more clearly an entire one. So under a contract by a teacher to teach for nine months at forty-five dollars per pupil, he cannot recover on the contract if he teaches for only eight months and a half.² The question of the right to recover in quasi contract in such cases is discussed elsewhere.³ The question of the entirety of a contract is also presented in determining whether a separate action can be brought for each breach. An employe who is wrongfully discharged, has a choice of remedies; all of them, according to the view entertained by the majority of the courts, are based upon the theory that the contract is an entire one. He may ignore the contract,

²⁴ *Montgomery County v. Emigrant Co.*, 47 Ia. 91.

²⁵ *Aultman, etc., Co. v. Lawson*, 100 Ia. 569; 69 N. W. 865.

¹ Employment for a year: wages payable monthly. *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387; 4 So. 426; *Larkin v. Hecksher*, 51 N. J. L. 133; 3 L. R. A. 137; 16 Atl. 703. Employment for a year

at a certain sum per week; wages payable weekly. *Olmstead v. Bach*, 78 Md. 132; 44 Am. St. Rep. 273; 22 L. R. A. 74; 27 Atl. 501.

² *Hill v. Balkcom*, 79 Ga. 444; 5 S. E. 200.

³ See Ch. LXXIV. Employment for six months certain at eleven dollars per month. *Larkin v. Buck*, 11 O. S. 561.

and sue in *quantum meruit* for the services already rendered.⁴ Choosing this remedy bars an action on the contract for damages, to which the employe is otherwise entitled.⁵ Since this action upon the contract for damages is on an entire contract, the employe must bring one action and must therein recover all the damages arising to him out of such breach.⁶ If he recovers a judgment after the breach for the value of his services for a short period of time thereafter, such judgment is a bar to any future recovery for breach of such contract.⁷ Some courts have entertained a contrary theory, treating the contract as in legal effect as severable, and allowing the employe to recover each installment of wages as it would have come due under the contract had it not been broken, under the theory of constructive services.⁸ The English cases at first took the latter view,⁹ but the early cases were subsequently overruled,¹⁰ and the view that only one action would lie was finally adopted. The theory of constructive services is, however, contrary to a fundamental principle of Modern Law, namely, that the injured party must take all reasonable steps to mitigate damages. If an employe is discharged during the performance of his contract for cause, he may recover for the services rendered by him less the amount of damage which his misconduct has caused to his employers.¹¹

§1488. Contract to furnish support.

A contract to furnish support is broken by a refusal or omission to furnish such support.¹ It has been held that it is

⁴ Keedy v. Long, 71 Md. 385; 5 L. R. A. 759; 18 Atl. 704.

⁵ Keedy v. Long, 71 Md. 385; 5 L. R. A. 759; 18 Atl. 704.

⁶ Pierce v. R. R., 173 U. S. 1; Dugan v. Anderson, 36 Md. 567; 11 Am. Rep. 509; Larkins v. Hecksher, 51 N. J. L. 133; 3 L. R. A. 137; 16 Atl. 703; Rhoades v. R. R., 49 W. Va. 494; 87 Am. St. Rep. 826; 39 S. E. 209; 55 L. R. A. 170.

⁷ See §§ 1353, 1487.

⁸ See § 1487.

⁹ Gandell v. Pontigny, 4 Campbell, 375.

¹⁰ Archard v. Hornor, 3 Car. & P. 349; Goodman v. Pocock, 15 Ad. & El. 576.

¹¹ Hildegrand v. Art. Co., 109 Wis. 171; 53 L. R. A. 826; 85 N. W. 268.

¹ Payette v. Ferrier, 20 Wash. 479; 55 Pac. 629; Knutson v. Bos-trak, 99 Wis. 469; 75 N. W. 156.

broken by refusal to furnish support at any reasonable place selected by the obligee.² A contract to care for one "in her old days" is broken by caring for her for five years, and rendering no services for the next sixteen years.³ A contract to care for a certain child as for one of his own children is broken by placing her when insane in the county asylum among common paupers.⁴ A contract to support one's parent requires kind treatment as well as the necessities of life.⁵ Contracts for support are sometimes treated as entire contracts. If A has agreed to support B for life and refuses to perform, B may treat this as a total breach and sue for damages as on an entire contract.⁶

§1489. Installment contracts.

Contracts are often made which require delivery, or payment, or both, in installments. Whether such contracts are entire, and whether a breach as to one installment is a discharge as to the remaining installments is a question upon which there is hopeless divergence of judicial authority, since different courts act on two distinct theories, which sometimes produce the same results, but more often different ones. One theory is that such contracts are entire, and that a breach by one party as to one installment is the breach of "a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."¹ The other theory is that such breach does not of itself amount to a discharge, but that it is only when the party breaking the contract shows that he repudiates his contractual obligation, that it is to be treated as a breach by renunciation,² and hence a discharge.³ In ap-

² Tuttle v. Burgett, 53 O. S. 498; 53 Am. St. Rep. 649; 30 L. R. A. 214; 42 N. E. 427.

³ Teats v. Flanders, 118 Mo. 660; 24 S. W. 126.

⁴ Vancleave v. Clark, 118 Ind. 61; 3 L. R. A. 519; 20 N. E. 527.

⁵ Lathrop v. Mayer, 86 Mo. App. 355.

⁶ Parker v. Russell, 133 Mass. 74.

¹ Norrington v. Wright, 115 U. S. 188, 203; quoted in Cleveland Rolling Mill v. Rhodes, 121 U. S. 254, 261.

² See § 1442.

³ See § 1442.

plying this last theory some courts have treated such contracts as entire on one side and apportionable on the other.*

§1490. Failure of vendee to pay installment due.

If a contract is entered into whereby A is to sell¹ or lease² property to B, or to do certain work for B,³ the performance whereof is to extend over a considerable space of time, and B is to pay in installments during such space of time, B's failure to pay an installment operates, according to many authorities, as a breach of the entire contract and discharges A from further performance. This holding is placed by some courts upon the ground that such default in payment is an abandonment of the contract.⁴ If the party in default expressly or impliedly repudiates liability under the contract, as by notifying the adversary party to quit work when he expresses himself as willing to continue if payments were made or assured,⁵ the theory of abandonment clearly applies. Other courts base their holding on the theory that the party in default

* "The contract in this case is clearly an illustration of a contract of sale which is entire on one side and apportionable on the other." *Johnson Forge Co. v. Leonard*, 3 Penne. (Del.) 342, 347; 94 Am. St. Rep. 86; 57 L. R. A. 225; 51 Atl. 305.

¹ *Honck v. Muller*, 7 Q. B. D. 92; *Veerkamp v. Drying Co.*, 58 Cal. 229; 41 Am. Rep. 265; *Johnson Forge Co. v. Leonard*, 3 Penne. (Del.) 342; 94 Am. St. Rep. 86; 57 L. R. A. 225; 51 Atl. 305; *Savannah Ice-Delivery Co. v. Transit Co.*, 110 Ga. 142; 35 S. E. 280; *Baltimore v. Schaub*, 96 Md. 534; 54 Atl. 106; *McGrath v. Gegner*, 77 Md. 331; 39 Am. St. Rep. 415; 26 Atl. 502; *National, etc., Co. v. Machine Co.*, 181 Mass. 275; 63 N. E. 900; *Kokomo Strawboard Co. v. Inman*, 134 N. Y. 92; 31 N. E. 248;

Shinn v. Bodine, 60 Pa. St. 182; 100 Am. Dec. 560.

² *Bean v. Fitzpatrick*, 67 N. H. 225; 38 Atl. 722.

³ Setting hedge. *Eastern Arkansas Hedge-Fence Co. v. Tanner*, 67 Ark. 156; 53 S. W. 886. Building levee. *San Francisco Bridge Co. v. Improvement Co.*, 119 Cal. 272; 51 Pac. 335. Building road. *Porter v. Reservoir Co.*, 100 Cal. 500; 35 Pac. 146. Constructing canal. *South Fork Canal Co. v. Gordon*, 6 Wall. (U. S.) 561. Clearing land. *Newton v. Improvement Co.*, 62 Minn. 436; 64 N. W. 1146. Digging ditch. *Dyer v. Irrigation District*, 25 Wash. 80; 64 Pac. 1009.

⁴ *Johnson Forge Co. v. Leonard*, 3 Penne. (Del.) 342; 94 Am. St. Rep. 86; 57 L. R. A. 225; 51 Atl. 305.

⁵ *Tennessee, etc., Ry. v. Danforth*, 112 Ala. 80; 20 So. 502.

has by withholding payment made performance by the adversary party impossible.⁶ Other authorities, however, hold that a mere default in payment of an installment, if not coupled with facts showing an intent on the part of the party in default to renounce his liability under the contract, does not operate as a discharge of the adversary party.⁷ If the vendor, instead of treating non-payment of one installment as a discharge, sues to recover such installment, the contract is so far severable that he may recover any installment due without waiting until he delivers all the installments.⁸ The same principle applies to a contract to do work payable in installments.⁹

§1491. Failure of vendor to deliver installment when due.

If the vendor does not deliver an installment at the time agreed upon, this is not a breach of the entire contract which excuses the vendee from taking and paying for subsequent installments delivered on time, according to view entertained by some courts.¹ Other courts, however, hold that a failure to deliver an installment when due, if the time of the delivery is of the essence of the contract, is such a breach as to discharge the vendee from his obligation to accept and pay for the remaining installments.² Thus under a contract to deliver

⁶ *Bean v. Bunker*, 68 Vt. 72; 33 Atl. 1068.

⁷ *Mersey Co. v. Naylor*, 9 App. Cas. 434; affirming 9 Q. B. D. 648; *Campbell v. McLeod*, 24 N. S. 66; *Cox v. McLaughlin*, 54 Cal. 605; *Keeler v. Clifford*, 165 Ill. 544; 46 N. E. 248; *Palm v. Ry.*, 18 Ill. 217; *Osgood v. Bauder*, 75 Ia. 550; 1 L. R. A. 655; 36 N. W. 887; *Winchester v. Newton*, 2 All. (Mass.) 492; *West v. Bechtel*, 125 Mich. 144; 51 L. R. A. 791; 84 N. W. 69; *Beatty v. Lumber Co.*, 77 Minn. 272; 79 N. W. 1013; *Wharton v. Winch*, 140 N. Y. 287; 35 N. E. 589; *Bethel v. Improvement Co.*, 93 Va. 354; 57 Am. St. Rep. 808;

33 L. R. A. 602; 25 S. E. 304.

⁸ *Withers v. Reynolds*, 2 Barn & Ad. 882; *W. K. Henderson Lumber Co. v. Stilwell*, 130 Mich. 124; 89 N. W. 718; *State v. Davis*, 53 N. J. L. 144; 20 Atl. 1080.

⁹ *Roberts v. Havelock*, 3 Barn. & Ad. 404.

¹ *Gerli v. Mfg. Co.*, 57 N. J. L. 432; 51 Am. St. Rep. 612; 30 L. R. A. 61; 31 Atl. 401; *Blackburn v. Reilly*, 47 N. J. L. 290; 54 Am. Rep. 159; 1 Atl. 27.

² *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; *Pope v. Porter*, 102 N. Y. 366; 7 N. E. 304; *Conway v. Fitzgerald*, 70 Vt. 103; 39 Atl. 634.

iron³ in specified installments, failure to deliver one installment at the time specified, if time is of the essence of the contract, is such a breach as to discharge the vendee. The same result has been reached under a contract to log and manufacture a certain amount of lumber and to load it on cars one season and to complete the work during the following season where the stipulated amount was not gotten out during the first season.⁴ On this question the English cases, in spite of heroic efforts to reconcile them, are in hopeless conflict; some holding that such a breach is a discharge,⁵ others that it is not.⁶ When one shipment was loaded before the time fixed by the contract, it was held to be such a breach as to discharge the vendee.⁷

§1492. Delivery of defective installment.

If the vendor delivers the amount agreed upon for each installment as it comes due, the fact that the goods delivered in certain installments are not up to the standard fixed by the contract, is not such breach of the entire contract as excuses the vendee from taking and paying for the remaining installments.¹ If the vendor does not deliver an installment at the time agreed upon, and the goods are not up to the standard, such default amounts to a breach of the entire contract and the vendee is justified in refusing to accept and pay for subsequent installments.²

³ Cleveland Rolling Mill v. Rhodes, 121 U. S. 255; Norrington v. Wright, 115 U. S. 188.

⁴ Conway v. Fitzgerald, 70 Vt. 103; 39 Atl. 634.

⁵ Hoare v. Rennie, 5 H. & N. 19; Coddington v. Paleologo, L. R. 2 Ex. 193; Reuter v. Sala, 4 C. P. D. 239.

⁶ Simpson v. Crippen, L. R. 8 Q. B. 14.

⁷ Bowes v. Shand, 2 App. Cas. 455; reversing 2 Q. B. D. 112; which reversed 1 Q. B. D. 470.

¹ Iron ore. Worthington v. Given, 119 Ala. 44; 43 L. R. A. 382; 24 So. 739. Corn. Miller v. Moore, 83 Ga. 684; 20 Am. St. Rep. 329; 6 L. R. A. 374; 10 S. E. 360. Bark. Blackburn v. Reilly, 47 N. J. L. 290; 54 Am. Rep. 159; 1 Atl. 27. Glass. Cahen v. Platt, 69 N. Y. 348; 25 Am. Rep. 203. Coal. Scott v. Coal Co., 89 Pa. St. 231; 33 Am. Rep. 753.

² Cloth. King Phillip Mills v. Slater, 12 R. I. 82; 34 Am. Rep. 603.

§1493. Other questions under installment contracts.

A contract to pay for building a house in installments as the work progresses is entire.¹ So, if the contract gives the builder the right to stop work at a certain stage and take a certain sum therefor, it is nevertheless an entire contract if for a complete building.² A contract for moving and repairing an old house and building an addition thereto, to be paid in installments as the work progresses is entire. No recovery of installments can be had, if before they come due the building is destroyed by fire.³ Such a contract is, however, so far severable that an action can be brought for each installment as it comes due.⁴

IX. WAIVER OF BREACH AS DISCHARGE.**§1494. Waiver of breach as ground of discharge.**

Waiver is a necessary correlative of election. Election is the choice between two inconsistent rights. Election of one of such rights is a waiver of the other. Accordingly if the party not in default has the right of election between treating breach by the party in default as a discharge of the contract, or treating the contract as in full force and effect, he may, if he choose, take the latter alternative. Such election waives his right to treat the contract as discharged.¹ Thus, if the vendor breaks the contract and the vendee insists on his continuing the performance, the vendee cannot subsequently elect

¹ McGowan v. United States, 35 Ct. Cl. 606; McConnell v. Hewes, 50 W. Va. 33; 40 S. E. 436. For purposes of a mechanic's lien Grace v. Building Association, 166 Ill. 637; 46 N. E. 1102; reversing 63 Ill. App. 339.

² Hunnicutt, etc., Co. v. Van Hoose, 111 Ga. 518; 36 S. E. 669.

³ Clark v. Collier, 100 Cal. 256; 34 Pac. 677.

⁴ Crawford v. McKinney, 165 Pa. St. 609; 30 Atl. 1047.

¹ Sorette v. Development Co., 31 N. S. 427; District of Columbia v. Iron Works, 181 U. S. 453; Witmer Brothers Co. v. Weid, 108 Cal. 569; 41 Pac. 491; Pitcher v. Lowe, 95 Ga. 423; 22 S. E. 678; Dahl v. Thompson, 98 Ia. 599; 67 N. W. 579; Jones v. Brown, 171 Mass. 318; 50 N. E. 648; Robinson v. Ry., 103 Mich. 607; 61 N. W. 1014; Klein v. Buck, 73 Miss. 133; 18 So. 891; Izard v. Kimmel, 26 Neb. 51; 41 N. W. 1068; Plummer v. Kelly, 7

to treat such breach as a discharge.² So if an employe for an indefinite period is laid off for a month without pay, and he acquiesces therein and treats the contract as in force, he cannot subsequently treat such breach as a discharge and recover on *quantum meruit*.³ If, the party not in default has elected after breach to treat the contract as still in effect, subsequent impossibility which would have discharged the contract had there been no breach, will discharge it since the breach is waived.⁴ While such waiver prevents the party not in default from subsequently treating the contract as ended, it does not prevent him from recovering damages for defective performance where no other ground of discharge exists,⁵ unless he has by his conduct induced the adversary party to make such defective performance by causing him to believe that such performance will be accepted in full discharge of his liability. No consideration for a waiver of breach as discharge is necessary.⁶

§1495. Knowledge of breach essential.

In order that the promisee may be held to waive a breach of the contract, he must know of the fact which constitutes such breach.¹ So the act of an insured in waiving one ground of forfeiture, does not affect the waiver of another ground of which the insured was ignorant.² So the acceptance of the performance of a contract to construct a drain, made as the result of fraud or mistake, does not amount to a final waiver of breach.³ So, in order that acceptance of defective perform-

N. D. 88; 73 N. W. 70; Laycock v. Moon, 97 Wis. 59; 72 N. W. 372; Tickler v. Mfg. Co., 95 Wis. 352; 70 N. W. 292.

² Pratt v. Mfg. Co., 115 Wis. 648; 92 N. W. 368.

³ Forbes v. Appleyard, 181 Mass. 354; 63 N. E. 894.

⁴ Avery v. Bowden, 5 E. & B. 714.

⁵ Gray v. New Paynesville, 89 Minn. 258; 94 N. W. 721.

⁶ Mahaska County State Bank v. Crist, 87 Ia. 415; 54 N. W. 450.

¹ Loudenback Fertilizer Co. v. Phosphate Co., 121 Fed. 298; Yorstons v. Brown, 178 Mass. 103; 59 N. E. 654; Stevenson v. Log-Towing Co., 103 Mich. 412; 61 N. W. 536.

² Planters' Mutual Ins. Co. v. Loyd, 67 Ark. 584; 77 Am. St. Rep. 136; 56 S. W. 44.

³ Van Akin v. Dunn. 117 Mich.

ance of a building contract may operate as a waiver it must be shown that the owner knew of the defects in performance.⁴ The fact that the departure from the specifications was plain does not dispense with knowledge thereof by the owner.⁵ If it is claimed that if one who has a right under contract to have his portrait inserted in a certain history, has accepted in place thereof its insertion in a so-called "portrait gallery" from which historical matter is omitted, it must be shown that he had full knowledge of his rights under the contract and that his portrait was omitted from the sort of work in which he had a right to have it inserted.⁶ However if the want of knowledge is the fault of the party who is alleged to have waived a breach committed by the adversary party, his conduct may amount to a waiver of the breach, even if its existence is unknown to him.⁷ Thus, if proof of printing is submitted to the party for whom the work is done, and he approves it, overlooking an error, he cannot object to such error in the finished work as a breach.⁸

§1496. Intention to waive breach essential.

To operate as a waiver the conduct of the party not in default must be such as to show affirmatively his intention to treat the contract as still in effect.¹ This intention may either actually exist or it may so appear to exist as to mislead the adversary party and thus work an estoppel.² Silence by the party not in default does not of itself amount to a waiver.³

421; 75 N. W. 938. For similar facts see *Weston v. Syracuse*, 158 N. Y. 274; 70 Am. St. Rep. 472; 43 L. R. A. 678; 53 N. E. 12.

⁴ *Farmers', etc., Bank v. Woodell*, 38 Or. 294; 61 Pac. 837; 65 Pac. 520; *Moore v. Carter*, 146 Pa. St. 492; 23 Atl. 243.

⁵ *Moore v. Carter*, 146 Pa. St. 492; 23 Atl. 243.

⁶ *Yorston v. Brown*, 178 Mass. 103; 59 N. E. 654.

⁷ *Skinner v. Norman*, 165 N. Y.

565; 80 Am. St. Rep. 776; 59 N. E. 309.

⁸ *Giles, etc., Co. v. Chase*, 149 Mass. 459; 14 Am. St. Rep. 439; 4 L. R. A. 480; 21 N. E. 765.

¹ *Boulder, etc., Co. v. Maxwell*, 24 Colo. 87; 48 Pac. 815; *Wilkinson v. Mfg. Co.*, 169 Mass. 374; 47 N. E. 1020.

² *Starr v. Ship Co.*, 68 Fed. 234.

³ *Eaton v. Gladwell*, 108 Mich. 678; 66 N. W. 598.

If the promisor wrongfully refuses performance the fact that the promisee is still ready and willing to perform if the promisor will continue to perform, does not of itself show that he has not accepted the promisor's renunciation as a final breach terminating the contract.⁴ So his unaccepted offer to continue the contract after breach on certain specified terms does not waive such breach.⁵ Conduct in strict compliance with the contract does not of itself amount to a waiver of any of its terms. Acceptance of a temporary bridge provided for by the contract does not amount to acceptance of a permanent bridge constructed thereafter under the contract.⁶ Conduct which clearly shows the intention of the promisee not to accept the performance tendered, does not amount to a waiver of breach. Thus if the owner denies that the contractor has performed his contract, but agrees to pay the contractor's workmen, such payment does not waive breach by the contractor.⁷ Still less does conduct by the promisee, which amounts merely to preparation on his part for performance constitute an acceptance and waiver of breach. Thus, where a number of farmers had contracted with A for the construction of a ditch, the fact that they levied an assessment upon themselves, and thereby raised the contract price is not an acceptance of A's performance.⁸ A waiver of one breach does not amount to a waiver of other and subsequent breaches.⁹ Thus where a contract is payable in installments, waiver of a breach by delay in paying earlier installments is not a waiver of the right to require the subsequent installments to be paid when due, if the promisor is not misled by the conduct of the promisee.¹⁰ This is especially clear where the party in default is notified that subsequent breaches will not

⁴ *Mutual, etc., Association v. Taylor*, 99 Va. 208; 37 S. E. 854.

⁵ *Sheffield Furnace Co. v. Coke Co.*, 101 Ala. 446; 14 So. 672.

⁶ *Stimson Mill Co. v. Traction Co.*, 141 Cal. 30; 74 Pac. 357.

⁷ *Gilliam v. Brown*, 116 Cal. 454; 48 Pac. 486.

⁸ *Gilliam v. Brown*, 116 Cal. 454; 48 Pac. 486.

⁹ *Disbrow v. Harris*, 122 N. Y. 362; 25 N. E. 356; *Patterson v. Glassmire*, 166 Pa. St. 230; 31 Atl. 40.

¹⁰ *San Francisco Bridge Co. v. Improvement Co.*, 119 Cal. 272; 51 Pac. 335; *Wilkinson v. Mfg. Co.*, 169 Mass. 374; 47 N. E. 1020; *Herman v. Gieseke* (Tex. Civ. App.), 33 S. W. 1006.

be waived.¹¹ So waiver of a breach by failure to pay a premium when due, as a ground of forfeiture, and giving an extension of time by taking a note therefor, does not waive a right secured by the contract to forfeit the policy if such note is not paid when due.¹² Paying certain installments under a building contract, without the certificate of the architect or engineer, does not waive the owner's right to require such certificate before paying the final installments.¹³ Making part payments on a building contract does not of itself waive defects in performance so as to amount to a final acceptance of the work.¹⁴ Waiver of a provision of a contract as to the time of performance does waive provisions as to the method of performance.¹⁵ Under a contract to raise an employe's salary if he abstains from drinking and gambling, refraining from discharging him for the continuation of such condition, does not waive the condition as to a increase of salary.¹⁶

§1497. Free choice of party not in default essential.

In order that acceptance by the promisee may constitute waiver of breach, the promisee must have a choice between accepting and rejecting the work done. If rejection is for any reason impossible, his conduct should not be looked upon as a waiver of a breach. Questions of this sort often arise under building contracts. One upon whose land the building has been erected by another has, in the view of many courts, no fair choice between accepting or rejecting the work done. Unless he takes possession of the property, he is either obliged to abandon his land or to remove or tear down the building erected, often at great expense. Accordingly it has been held

¹¹ *Strauss v. Russell Co.*, 85 Fed. 589.

¹² *Thompson v. Ins. Co.*, 104 U. S. 252.

¹³ *Bradley Currier Co. v. Bernz*, 55 N. J. Eq. 10; 35 Atl. 832; *Yahr v. School District*, 99 Wis. 281; 74 N. W. 779.

¹⁴ *Hattin v. Chase*, 88 Me. 237; 33 Atl. 989.

¹⁵ Building contract. *Jacksonville, etc., Ry. v. Woodworth*, 26 Fla. 368; 8 So. 177. Mining contract. *Murray v. Heinze*, 17 Mont. 353; 42 Pac. 1057; 43 Pac. 714.

¹⁶ *Van Vleet v. Hayes*, 56 Ark. 128; 19 S. W. 427.

that the mere fact that the owner takes possession of a building erected upon his land, is not such acceptance as to waive the production of the architect's certificate of complete performance required by the terms of the contract;¹ nor is it an acceptance of the performance tendered so as to entitle the contractor to recover upon the contract.² Thus the use of a cathedral is not of itself acceptance of performance of a contract for tiling the roof thereof.³ So making use of steps and a walk leading from a door to the street,⁴ or making use of a boiler placed in a factory to furnish motive power,⁵ do not of themselves waive breaches of such contracts.

§1498. Express approval of performance tendered.

Express acquiescence in performance as tendered, thereby inducing the adversary party to believe that such performance is accepted as complete performance amounts to a waiver. If the owner of a building in fact acquiesces in and approves of the work as done, such approval amounts to an acceptance,¹ and waives objections such as failures to conform to the dimensions specified.² Accordingly such parts of a building as have been completed, accepted, and paid for by the owner before the entire building is completed, are thenceforth at the owner's risk in case of loss by fire.³ Under some statutes occupying a building is conclusive evidence of its completion.

¹ Hanley v. Walker, 79 Mich. 607; 8 L. R. A. 207; 45 N. W. 57; Gillis v. Cobe, 177 Mass. 584; 59 N. E. 455.

² Fitzgerald v. La Porte, 64 Ark. 34; 40 S. W. 261; Hanley v. Walker, 79 Mich. 607; 8 L. R. A. 207; 45 N. W. 57; Elliott v. Caldwell, 43 Minn. 357; 9 L. R. A. 52; 45 N. W. 845; Haynes v. Church, 88 Mo. 285; 57 Am. Rep. 413; Franklin v. Schultz, 23 Mont. 165; 57 Pac. 1037; Fuller v. Brown, 67 N. H. 188; 34 Atl. 463; Feeney v. Bardsley, 66 N. J. L. 239; 49 Atl. 443; Anderson v. Todd, 8 N. D. 158; 77

N. W. 599; Bender v. Buehrer, 8 Ohio C. C. 244.

³ Fitzgerald v. La Porte, 64 Ark. 34; 40 S. W. 261.

⁴ Givinnup v. Shies, 161 Ind. 500; 69 N. E. 158.

⁵ Manitowoc, etc., Co. v. Glue Co., — Wis. —; 97 N. W. 515.

¹ Strome v. Lyon, 110 Mich. 680; 68 N. W. 983; Vanderhoof v. Shell, 42 Or. 578; 72 Pac. 126; Shum v. Claghorn, 69 Vt. 45; 37 Atl. 236.

² Hutchins v. Webster, 165 Mass. 439; 43 N. E. 186.

³ McAlpine v. Female Academy, 101 Wis. 468; 78 N. W. 173.

This is true only where the provisions of the statute requiring such contract to be filed have been fully complied with.⁴ An approval of proof of printing submitted for examination, and a direction to go ahead and print, is an acceptance of such proof, even though a material misprint was overlooked by both parties to the contract.⁵ So approval of a clay model of a monument prevents the vendee from subsequently avoiding liability because he is dissatisfied with the plaster cast made therefrom.⁶ In building contracts a disregard of certain covenants thereof by both parties while the contract is being performed is a waiver of such provisions and a breach thereof cannot be subsequently invoked as a discharge of the contract.⁷ Thus provisions as to the method of determining extras,⁸ or forbidding sub-contracting without the owner's written consent,⁹ are waived by acting without reference thereto. So terms and specifications in a building contract,¹⁰ or a provision requiring the certificate of the architect or engineer before payment,¹¹ may be waived by the parties. So a provision for forfeiture of a contract for printing, in case of assignment, is waived by acting under the contract with full knowledge of such assignment.¹² A contract requiring written notice of defects in an article sold is waived by the vendor's acting upon a verbal notice.¹³ A provision in a contract to convey land to a corporation to be organized, that the capital stock shall be taken by *bona fide* and responsible parties, is waived where the promisor becomes a stockholder and acquiesces in the expenditures of money on behalf of the corporation without paying his subscription himself, and with presumptive knowledge of the finan-

⁴ Willamette, etc., Co. v. College Co., 94 Cal. 229; 29 Pac. 629.

⁵ Giles, etc., Co. v. Chase, 149 Mass. 459; 14 Am. St. Rep. 439; 4 L. R. A. 480; 21 N. E. 765.

⁶ Thomas v. Gage, 156 N. Y. 612; 51 N. E. 307.

⁷ Wood v. Boney (N. J. Eq.), 21 Atl. 574; Beswick v. Platt, 140 Pa. St. 28; 21 Atl. 306.

⁸ Meyer v. Berlandi, 53 Minn. 59; 54 N. W. 937.

⁹ Danforth v. Ry., 93 Ala. 614; 11 So. 60.

¹⁰ Wood v. Boney (N. J. Eq.), 21 Atl. 574; Beswick v. Platt, 140 Pa. St. 28; 21 Atl. 306.

¹¹ O'Rourke v. Burke, 44 Neb. 821; 63 N. W. 17.

¹² Norton v. Roslyn, 10 Wash. 44; 38 Pac. 878.

¹³ Dean v. Nichols, etc., Co., 25 Ia. 89; 63 N. W. 582.

cial responsibility of the remaining stockholders.¹⁴ A covenant not to use certain realty as a hotel,¹⁵ or a covenant to build to a certain line,¹⁶ may each be waived by acquiescing in a different use of such realty.

§1499. Acceptance of defective performance.

If the promisee with full knowledge of the facts, voluntarily accepts less than full performance of the contract, the promisee thereby waives such breach of contract as a ground of discharge.¹ Thus a clause in a building contract, requiring the contractor to give bond, is waived by allowing him to construct the building without giving such bond.² The same rule applies where a provision that no sub-contracts shall be let without the owner's written consent is waived by the owner's permitting sub-contractors to do part of the work without objection.³ So a breach of a contract to furnish support is waived by continuing to receive support under such contract.⁴ Thus a contract for the sale of land, requiring the vendee to pay taxes, is not discharged by vendee's failure to pay such taxes where subsequently the vendor recognizes such contract as in full force.⁵ If A is to complete a tramway by a certain date, and haul logs for B, and A does not complete the tramway by the date specified, the fact that B urges A to complete it, waives a right given to B by the terms of the contract to forfeit the contract to take charge of and complete the tramway if A

¹⁴ *Work v. Welsh*, 160 Ill. 468; 43 N. E. 719.

¹⁵ *Hemsley v. Hotel Co.*, 63 N. J. Eq. 804; 52 Atl. 1132; affirming without report, 62 N. J. Eq. 164; 50 Atl. 14.

¹⁶ *Scollard v. Normile*, 181 Mass. 412; 63 N. E. 941.

¹ *Westervelt v. Huiskamp*, 101 Ia. 196; 70 N. W. 125; *Wiley v. Athol*, 150 Mass. 426; 6 L. R. A. 342; 23 N. E. 311; *Gray v. New Paynesville*, 89 Minn. 258; 94 N. W. 721; *O'Dea v. Winona*, 41 Minn. 424; 43 N. W. 97; *Weston v. Syracuse*,

158 N. Y. 274; 70 Am. St. Rep. 472; 43 L. R. A. 678; 53 N. E. 12; *Tennessee, etc., Co. v. Wilson* (Tenn. Ch. App.), 46 S. W. 342.

² *Devlan v. Wells*, 65 N. J. 213; 47 Atl. 467. See to the same effect. *Ford v. Dyer*, 148 Mo. 528; 49 S. W. 1091.

³ *Danforth v. Ry.*, 93 Ala. 614; 11 So. 60.

⁴ *Dunklee v. Hooper*, 69 Vt. 65; 37 Atl. 225.

⁵ *Matthews v. Kerfoot*, 167 Ill. 313; 47 N. E. 859; *Boyum v. Johnson*, 8 N. D. 306; 79 N. W. 149.

does not complete it by the time agreed upon.⁶ The fact of acceptance as a waiver of promisee's right to invoke a breach of the promisor as a discharge of the contract is especially clear where the promisor tenders a substantial performance of the contract which is accepted by the promisee.⁷ Acceptance by an engineer or architect who is authorized to represent the owner in a building contract, waives such defects in the material tendered in performance of the contract as could be discovered by exercising ordinary care.⁸ Other illustrations of acceptance with full knowledge of the facts, amounting to a waiver of breach as a ground for discharge, are found in contracts for constructing waterworks,⁹ paving streets and alleys,¹⁰ constructing ditches,¹¹ constructing a building¹² or digging a well, even if the supply of water subsequently fails.¹³ So a provision that a contract for extension of time on debts by taking the debtor's notes therefor shall not take effect unless all the creditors enter into such contract, is waived by accepting such notes when some creditors have not assented.¹⁴ So the right to avoid a contract for the sale of realty,¹⁵ as for the vendor's failure to furnish an abstract of title,¹⁶ or because of a defect

⁶ *Thompson Lumber Co. v. Howard* (Ky.), 57 S. W. 615; *Howard v. Thompson Lumber Co.*, 106 Ky. 566; 50 S. W. 1092.

⁷ *Fitzgerald v. La Porte*, 64 Ark. 34; 40 S. W. 261; *Griffith v. Happersberger*, 86 Cal. 605, 614; 25 Pac. 137, 487; *Flaherty v. Miner*, 123 N. Y. 382; 25 N. E. 418; *Smith v. Alker*, 102 N. Y. 87; 5 N. E. 791; *Linch v. Elevator Co.*, 80 Tex. 23; 15 S. W. 208; *Laycock v. Parker*, 103 Wis. 161; 79 N. W. 327.

⁸ *Ashland, etc., Co. v. Shores*, 105 Wis. 122; 81 N. W. 136; *Laycock v. Moon*, 97 Wis. 59; 72 N. W. 372.

⁹ *Creston Waterworks Co. v. Creston*, 101 Ia. 687; 70 N. W. 739; *Winfield Water Co. v. Winfield*, 51 Kan. 104; 33 Pac. 714; *Wiley v. Athol*, 150 Mass. 426; 6 L. R. A. 342; 23 N. E. 311; *Lamar, etc., Co.*

v. Lamar, 140 Mo. 145; 39 S. W. 768.

¹⁰ *Philadelphia v. Hays*, 93 Pa. St. 72.

¹¹ *Flick v. Mining Co.*, — Colo. App. —; 66 Pac. 453; *Swank v. Barnum*, 63 Minn. 447; 65 N. W. 722.

¹² *Aarnes v. Windham*, 137 Ala. 513; 34 So. 816; *Vanderhoof v. Shell*, 42 Or. 578; 72 Pac. 126.

¹³ *Wunsch v. Boldt*, 4 Tex. App. Civ. 76; 15 S. W. 193. *Contra* if the contractor has agreed to furnish an "inexhaustible" supply. *Vincent v. Morrison*, 53 Mo. App. 497.

¹⁴ *Garner v. Fite*, 93 Ala. 495; 9 So. 367.

¹⁵ *McCourt v. Johns*, 33 Or. 561; 53 Pac. 601.

¹⁶ *McAlpine v. Reicheneker*, 56 Kan. 100; 42 Pac. 339.

in the title,¹⁷ or because a building on the property extends over the boundary line,¹⁸ may be waived, even after a notice of forfeiture has been given, if both parties treat the contract as still in force.¹⁹ Delay in avoiding the contract may waive the right to avoid it,²⁰ as where in the meantime the land depreciates in value.²¹

§1500. Acceptance of property delivered as performance.

If the promisee, with the knowledge of the breach, voluntarily retains property delivered to him in performance of the contract, which property it is possible for him to return to the promisor, such retention will amount to a waiver of the breach so as to preclude him from using such breach as a discharge.¹ So under a contract for the sale of chattels, acceptance of chattels which do not conform to the terms of the contract, with full knowledge of such facts, or with full opportunity to learn them, is a waiver of such breach, and the vendee cannot avoid liability under the contract by reason thereof.² Thus accepting seats of a different design,³ beds of a different width,⁴ or soda ash of a lower per cent of alkali,⁵ from that

¹⁷ *Coleman v. Bank*, 115 Ala. 307; 22 So. 84.

¹⁸ *Corbett v. Schulte*, 119 Mich. 249; 77 N. W. 947.

¹⁹ *Clark v. Neumann*, 56 Neb. 374; 76 N. W. 892.

²⁰ *Coleman v. Bank*, 115 Ala. 307; 22 So. 84; *Corbett v. Schulte*, 119 Mich. 249; 77 N. W. 947; *McCourt v. Johns*, 33 Or. 561; 53 Pac. 601.

²¹ *Bennett v. Hickey*, 112 Mich. 379; 70 N. W. 900.

¹ *German Savings Institution v. Refrigerating Co.*, 70 Fed. 146; 17 C. C. A. 34.

² *Frey-Sheckler Co. v. Brick Co.*, 104 Ia. 494; 73 N. W. 1051; *Hirshhorn v. Stewart*, 49 Ia. 418; *Henkel v. Welsh*, 41 Mich. 664; 3 N. W. 171; *Gaff v. Homeyer*, 59 Mo. 345; *Waeber v. Talbot*, 167 N. Y. 48; 82

Am. St. Rep. 712; 60 N. E. 288; *Brady v. Cassidy*, 145 N. Y. 171; 39 N. E. 814; *Luger Furniture Co. v. Street*, 6 Okla. 312; 50 Pac. 125; *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150; 44 Pac. 390; *Houston v. Cook*, 153 Pa. St. 43; 25 Atl. 622; *Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449; 49 L. R. A. 859; 82 N. W. 299; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53; 36 Am. St. Rep. 895; 21 L. R. A. 135; 54 N. W. 28.

³ *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150; 44 Pac. 390.

⁴ *Luger Furniture Co. v. Street*, 6 Okla. 312; 50 Pac. 125.

⁵ *Cream City Glass Co. v. Friedlander*, 84 Wis. 53; 36 Am. St. Rep. 895; 21 L. R. A. 135; 54 N. W. 28.

specified in the contract, waives the right to treat such breach as a discharge.

§1501. Acceptance of property not intended as waiver.

Since intention to waive breach is essential the mere fact of possession of the property tendered by the adversary party in performance of the contract, is not conclusively an acceptance so as to waive breach.¹ Thus if A, who has agreed to give certain securities to B to secure a debt of B's, tenders B a note in place of such security, and on B's refusal to take it A throws it on the table in front of B and goes away without it, such facts do not constitute an acceptance by B.² The fact that the promisee takes possession of the property tendered in performance, for the purpose of testing it, and seeing whether it complies with the terms of the contract or not, does not amount to an acceptance.³ Thus, if A digs a well for B, agreeing that it shall furnish water for certain purposes, B's act in using such well to test its capacity does not amount to an acceptance thereof so as to waive breach.⁴ If, however, certain defects are apparent, and known to the promisee, his act in making use of part of such property amounts to an acceptance of the entire lot offered and such defects are thereby waived.⁵

§1502. Waiver of provisions as to time of performance.

If the promisor has made default in performance with respect to the time thereof, and the promisee subsequently permits or urges him to continue performance,¹ or accepts per-

¹ Pennington v. Howland, 21 R. I. 65; 79 Am. St. Rep. 774; 41 Atl. 891.

² Whyte v. Rosenerantz, 123 Cal. 634; 69 Am. St. Rep. 90; 56 Pac. 436.

³ Wind v. Iler, 93 Ia. 316; 27 L. R. A. 219; 61 N. W. 1001.

⁴ Genni v. Hahn, 82 Wis. 90; 51 N. W. 1096.

⁵ Cream City Glass Co. v. Friedlander, 84 Wis. 53; 36 Am. St. Rep. 895; 21 L. R. A. 135; 54 N. W. 28.

¹ German Savings Institute v. Machine Co., 70 Fed. 146; 17 C. C. A. 34; Andrews v. Tucker, 127 Ala. 602; 29 So. 34; McArthur Brothers v. Whitney, 202 Ill. 527; 67 N. E. 163; Prentiss v. Lyons, 105 La. 382; 29 So. 944; Orem v. Keelty, 85

formance thereafter,² or accepts payments made in performance,³ or otherwise treats such contract as still in force,⁴ such breach is waived. Thus permitting a contractor to complete a building contract after the time fixed by such contract for performance waives the right to treat such default as discharge.⁵ Breach of a contract to make a designated payment at a designated time, as a means of securing the release of a lot from a trust deed, is waived by the payee's recognizing such contract as still existing.⁶ Waiver in such cases is often clearer where the delay has been requested by the promisee,⁷ or where he has authorized the same in advance,⁸ or led the adversary party to believe that strict performance would not be insisted on,⁹ or where modifications of the contract requested by him have caused such delay in performance.¹⁰ Thus a delay in suing on an insurance policy for a period greater than that fixed by such policy, does not prevent recovery if made at the

Md. 337; 36 Atl. 1030; *Bean v. Bunker*, 68 Vt. 72; 33 Atl. 1068.

² *Jeffrey Mfg. Co. v. Iron Co.*, 93 Fed. 408; *Neosho City Water Co. v. Neosho*, 136 Mo. 498; 38 S. W. 89.

³ *Davis v. Robert*, 89 Ala. 402; 18 Am. St. Rep. 126; 8 So. 114; *Mack v. Dailey*, 67 Vt. 90; 30 Atl. 686.

⁴ Contract for sale of realty after default by vendee. *Monson v. Bragdon*, 159 Ill. 61; 42 N. E. 383; *Moore's Estate*, 191 Pa. St. 600; 43 Atl. 474. After default by vendor. *Garbes v. Roberts*, 98 Wis. 173; 73 N. W. 995. Contract for the sale of stock. *Jones v. Brown*, 171 Mass. 318; 50 N. E. 648. Contract for delivering bonds to be held as collateral security. *Herr v. Sullivan*, 25 Colo. 190; 54 Pac. 637. Contract for constructing streets after default by the contractor. *Orem v. Keelty*, 85 Md. 337; 36 Atl. 1030.

⁵ *Barnard v. McLeod*, 114 Mich. 73; 72 N. W. 24; *Wortman v. Ry.*, 22 Mont. 266; 56 Pac. 316; *Linch v. Elevator Co.*, 80 Tex. 23; 15 S. W. 208; *Long v. Pierce County*, 22 Wash. 330; 61 Pac. 142; *Brodek v. Farnum*, 11 Wash. 565; 40 Pac. 189.

⁶ *Lapsley v. Howard*, 119 Mo. 489; 24 S. W. 1020.

⁷ *Hinckley v. Steel Co.*, 121 U. S. 264; *Barnes v. Stacy*, 79 Wis. 55; 48 N. W. 53.

⁸ *Emerson v. Slater*, 22 How. (U. S.) 28; *Watson v. White*, 152 Ill. 364; 38 N. E. 902; *Loveridge v. Shurtz*, 111 Mich. 618; 70 N. W. 132; *Clark v. Bache*, 186 Pa. St. 343; 40 Atl. 484; *Atlantic, etc., Ry. v. Construction Co.*, 98 Va. 503; 37 S. E. 13.

⁹ *Lessell v. Goodman*, 97 Ia. 681; 59 Am. St. Rep. 432; 66 N. W. 917.

¹⁰ *Cornish v. Suydam*, 99 Ala. 620; 13 So. 118; *Davis v. Badders*, 95 Ala. 348; 10 So. 422.

suggestion of an agent of the insurer.¹¹ Thus, if the collector for a telephone company suggests a delay in the payment of rental for a telephone, the telephone company cannot thereafter use such delay as a ground for forfeiture of the contract.¹² So under a building contract a contractor is excused for delay which is caused by a change in the plans¹³ or material¹⁴ ordered by the owner. Even if the contract provides that orders for extra work must be in writing, delay caused by the contractor's complying with oral orders of the owner is excused.¹⁵ On the other hand he may decline to perform after the plans are changed unless the architects put extra allowance for changes in writing as required by the contract; and he may decline to act under oral allowance.¹⁶ However, if the promisor has specifically agreed to take all risks, he is not allowed to show that improper performance on the part of the promisee caused breach by the promisor.¹⁷ Under a subsequent agreement to extend the time of performance to a certain date, there is no waiver of the right to treat the contract as discharged by failure to perform at that date.¹⁸

§1503. Waiver of provisions as to payment.

Acceptance of methods of payment other than those provided for by the contract waives the covenants of such contract with regard to such payment.¹ Thus an agreement to accept a draft unconditionally is waived by accepting a draft which is accepted conditionally.² So a provision that an agent would

¹¹ Hall v. Ins. Co., 23 Wash. 610; 83 Am. St. Rep. 844; 51 L. R. A. 288; 63 Pac. 505.

¹² Ashley v. Telephone Co., 25 Mont. 286; 64 Pac. 765.

¹³ Dodd v. Churton (1897), 1 Q. B. 562; Texas, etc., Ry. v. Rust, 19 Fed. 239.

¹⁴ Vanderhoof v. Shell, 42 Or. 578; 72 Pac. 126; Lilly v. Person, 168 Pa. St. 219; 32 Atl. 23.

¹⁵ Foelt v. Rosenbaum, 176 Pa. St. 14; 34 Atl. 1001.

¹⁶ Mitchell v. Dougherty, 90 Fed. 639; 33 C. C. A. 205.

¹⁷ Warren-Scharf Asphalt Paving Co. v. St. Paul, 69 Minn. 453; 72 N. W. 711.

¹⁸ Drown v. Ingells, 3 Wash. 424; 28 Pac. 759.

¹ Plummer v. Kelly, 7 N. D. 88; 73 N. W. 70. Method of weighing ore to determine royalty due under a mining lease. American Manganese Co. v. Manganese Co., 91 Va. 272; 21 S. E. 466.

² Ryalls v. Moody, 102 Ala. 519; 15 So. 240.

indorse notes taken by him for his principal is waived by accepting notes indorsed by him without recourse.³ So a provision to pay cash is waived by accepting a cognovit note,⁴ and a provision requiring certified checks to be given is waived by accepting uncertified checks.⁵ So a provision fixing the place of performance is waived by acquiescing in a demand for performance elsewhere.⁶

§1504. Arbitrary refusal as waiver.

If one party to the contract refuses to accept performance of any kind, and thereby leads the adversary party to refrain from tendering performance, such refusal waives such failure to perform.¹ Thus a variance between a lease contracted for, and the one offered, is waived by the lessee's refusal to accept any lease at all.² A refusal to perform on the ground of a specific breach assigned by the party so refusing as a ground for such refusal, is a waiver of other breaches which are known to him or brought to his notice.³ A refusal to perform a contract to forward cattle, on the ground that the promisor did not have a sufficient number of cars, prevents the carrier from subsequently urging the objection that in that state it was illegal to forward on Sunday.⁴ So a refusal of a tender of the purchase price made by an assignee of the vendee on the ground that the amount is insufficient waives breach of a provision forbidding assignment.⁵ So a refusal to accept goods tendered

³ Aultman v. Martin, 49 Neb. 103; 68 N. W. 340.

⁴ Clark v. Bache, 186 Pa. St. 343; 40 Atl. 484.

⁵ Millar v. Smith, 28 Tex. Civ. App. 386; 67 S. W. 429.

⁶ Kuhn v. McKay, 7 Wyom. 42; 49 Pac. 473; 51 Pac. 205.

¹ Bank v. Trading Co. (1894), A. C. 266; Davis v. Granite Co., 75 Vt. 286; 54 Atl. 1084.

² Freeland v. Ritz, 154 Mass. 257; 26 Am. St. Rep. 244; 12 L. R. A. 561; 28 N. E. 226.

³ Monson v. Bragdon, 159 Ill. 61; 42 N. E. 383; Robert Mitchell Furniture Co. v. Monarch (Ky.), 39 S. W. 823; Goddard v. Morrissey, 172 Mass. 594; 53 N. E. 207; Marlborough Gaslight Co. v. Neal, 166 Mass. 217; 44 N. E. 139; Hixson Map Co. v. Post Co. (Neb.), 98 N. W. 872; Wright v. Land Co., 100 Wis. 269; 75 N. W. 1000.

⁴ Ohio, etc., Ry. v. McCarthy, 96 U. S. 258.

⁵ Cheney v. Billy, 74 Fed. 52; 20 C. C. A. 291.

in performance of a contract of sale upon the sole ground that such delivery is too late, waives the objection that the entire amount of goods purchased must be delivered in one lot.⁶ So if a vendor stops delivering goods upon the sole ground that he has fully performed his part of the contract, he waives breach on the part of vendee by his failure to pay for prior installments when due.⁷ A provision in an insurance policy required proof of loss to be submitted in a certain time is waived by the company's denial of liability under the policy,⁸ as on the ground of suicide.⁹ Refusal to pay an insurance policy on the ground that the insured has no title to the premises, waives objections which might have been urged against the proof of loss.¹⁰ A policy on property in Porto Rico excepted loss during invasion or rebellion unless satisfactory proof was made that it was due to some cause other than such invasion or rebellion. The duty of producing such proof which rests upon the insured is waived by a notice given by the insurer without demanding proof, that it will not pay the loss because due to one of the excepted causes.¹¹ A refusal to perform on the ground that the contract is for some reason unenforceable, as because of the Statute of Frauds,¹² waives objections to the performance actually tendered.

§1505. Waiver conclusive as to third persons.

Acceptance by the promisee is usually conclusive as to third persons. A contract by a stepson to assist his stepfather,¹ or by a child to live with a man and his wife as their child,² or a

⁶ *Avery v. Willson*, 81 N. Y. 341; 37 Am. Rep. 503.

⁷ *Bean v. Bunker*, 68 Vt. 72; 33 Atl. 1068.

⁸ *Phenix Ins. Co. v. Luce*, 123 Fed. 257; *Condon v. Hail Association*, 120 Ia. 80; 94 N. W. 477; *Seely v. Ins. Co.*, 72 N. H. 49; 55 Atl. 425.

⁹ *McDonald v. Life Association*, 154 Mo. 618; 55 S. W. 999.

¹⁰ *German Ins. Co. v. Gueck*, 130

Ill. 345; 6 L. R. A. 835; 23 N. E. 112.

¹¹ *Royal Ins. Co. v. Martin*, 192 U. S. 149.

¹² *Meincke v. Falk*, 61 Wis. 623; 50 Am. Rep. 157; 21 N. W. 785.

¹ *Mills v. McCaustland*, 105 Ia. 187; 74 N. W. 930.

² As consideration for a contract to make a will. *Burns v. Smith*, 21 Mont. 251; 69 Am. St. Rep. 653; 53 Pac. 742. For a similar case,

contract of subscription to a college,³ are each sufficiently performed where the promisee accepts such performance as satisfactory to himself. Third persons cannot thereafter object that such contract was not performed.

X. WAIVER OF BREACH AS GROUND FOR DAMAGES.

§1506. Waiver of damages by contract.

If a consideration exists for waiving damages, an express or implied agreement to that effect is valid. Breach as a ground of action for damages may be waived by the party not in default. The same principles apply to such waiver as apply to waiver of breach as a ground of discharge; but the facts upon which such principles operate are so different that different results are often obtained. If the party in default is induced by the acts or conduct of the adversary party before such performance, to perform in the manner subsequently complained of, such conduct of the party not in default will ordinarily estop him from claiming damages. Thus if the party not in default knows of the intended method of performance and acquiesces therein,¹ he cannot subsequently recover damages for defective performance unless abatement for such defective performance has been an express or implied term of such acquiescence. Thus if A permits B without objection from A to make side connections for a steam-heating plant instead of top connections as provided for by contract, A cannot have deducted from the contract price the amount which it would cost to change such connections to make them conform to the contract.² So no damages for extra expenses in unloading lumber on account of alleging bad piling can be recovered by one who had the option to do such piling himself if the cost to the

see *Burdine v. Burdine*, 98 Va. 515; 81 Am. St. Rep. 741; 36 S. E. 992.

³ *Rogers v. Female College*, 64 Ark. 627; 39 L. R. A. 636; 44 S. W. 454.

¹ *Fitts v. Reinhart*, 102 Ia. 311; 71 N. W. 227; *Brighton v. Ry.*, 103

Mich. 420; 61 N. W. 550; *Taylor v. Lumber Co.*, 103 Mich. 1; 61 N. W. 5; *Goldsmith v. Hand*, 26 O. S. 101; *Laycock v. Moon*, 97 Wis. 59; 72 N. W. 372.

² *Fitts v. Reinhart*, 102 Ia. 311; 71 N. W. 227.

adversary party was not increased and who made no objection to the manner of piling until after suit was begun.³ So an employe who has a contract with a railroad company for employment for life if able and willing to work at specified wages, and who has accepted employment for fifteen years at less wages, waives his right to recover the amount specified in the contract.⁴ So acceptance of materials tendered in performance of a building contract, subject to inspection by the owner,⁵ waives objection to such materials as being defective. To waive damages, however, such acceptance and acquiescence must be absolute and unqualified.⁶ Thus acceptance after breach of performance of a specified part of the contract does not waive the right to recover damages for the breach of the remainder.⁷

§1507. Waiver of damages by estoppel.

If the party not in default leads the other to believe that he will not insist upon strict performance, or if he requests such breach,¹ or if he makes strict performance impossible,² he cannot subsequently recover damages for departure from strict performance caused by such representations or conduct. Thus one who accepts an unfinished boat before the time for its completion cannot recover a fixed amount per day agreed upon as damages for delay in completion.³ If the person for whom work is done inspects it as it progresses and accepts it after such inspection, as full performance of the contract, he cannot thereafter recover damages for alleged breach which such inspection could have disclosed.⁴ The same principle applies

³ *Taylor v. Lumber Co.*, 103 Mich. 1; 61 N. W. 5.

⁴ *Brighon v. Ry.*, 103 Mich. 420; 61 N. W. 550.

⁵ *Laycock v. Moon*, 97 Wis. 59; 72 N. W. 372.

⁶ *Brownell Improvement Co. v. Critchfield*, 197 Ill. 61; 64 N. E. 332; affirming, 96 Ill. App. 84.

⁷ *Sullivan v. McMillan*, 26 Fla. 543; 8 So. 450.

¹ *District of Columbia v. Iron*

Works, 181 U. S. 453; *Young v. Glass Co.*, 187 Ill. 626; 58 N. E. 605.

² *Vandegrift v. Engineering Co.*, 161 N. Y. 435; 48 L. R. A. 685; 55 N. E. 941.

³ *Vandegrift v. Engineering Co.*, 161 N. Y. 435; 48 L. R. A. 685; 55 N. E. 941.

⁴ *Parker v. Palmer*, 4 Barn. & Ald. 387; *Beverly v. Coke Co.*, 6 Ad. & El. 829; *United States v. Walsh*,

where the contract provides for inspection by the architect and he inspects and accepts the work.⁵ So if a contractor acquiesces in rejection of material by the inspector appointed by the adversary party and procures other material, he cannot claim damages for such delay.⁶

§1508. Knowledge of breach necessary.

In order to constitute waiver of breach a waiver of it as ground of action for damages, the party not in default must know of the facts which constitute such breach, or must have the means of knowing them. A payment for machinery made before it is completed, does not waive a claim for damages for defects in machinery or for delay in completing it.¹ Thus taking possession of a building does not waive defects which cannot be detected by inspection at the time but will develop by use, such as defects in plastering, by reason of which the plaster subsequently falls,² or defects in varnish.³ So the use of finishing material does not waive a claim for damages for defects not then discoverable which develop as it seasons.⁴

§1509. Waiver of breach as discharge not waiver of damages.

If no consideration for waiving damages exists and the defective performance has not been induced by the previous acts or representations of the party not in default, the question remains whether the mere fact of accepting defective performance waives the right to maintain an action for damages. Such

108 Fed. 502; Carleton v. Jenks, 80 Fed. 937; Hirshhorn v. Stewart, 49 Ia. 418; Pierson v. Crooks, 115 N. Y. 539; 12 Am. St. Rep. 831; 22 N. E. 349; Studer v. Bleistein, 115 N. Y. 316; 5 L. R. A. 702; 22 N. E. 243; Coplay Iron Co. v. Pope, 108 N. Y. 232; 15 N. E. 335; Norton v. Dreyfuss, 106 N. Y. 90; 12 N. E. 428; Dounce v. Dow, 64 N. Y. 411; Gurney v. Atlantic & G. W. R. Co., 58 N. Y. 358; Dounce v. Dow, 57 N. Y. 16.

⁵ Whitehead v. Brothers' Lodge (Ky.), 62 S. W. 873; Siebert v. Roth, 118 Wis. 250; 95 N. W. 118.

⁶ Montgomery v. New York, 151 N. Y. 249; 45 N. E. 550.

¹ Industrial Works v. Mitchell, 114 Mich. 29; 72 N. W. 25.

² Monahan v. Fitzgerald, 164 Ill. 525; 45 N. E. 1013.

³ Spink v. Mueller, 77 Mo. App. 85.

⁴ Utah Lumber Co. v. James, 25 Utah 434; 71 Pac. 986.

acceptance waives the right to treat such breach as a discharge of contract liability, on principles of estoppel, but from the nature of the case no such reasons exist for treating such acceptance as a waiver of the right to maintain an action for damages and the weight of authority is that it is not such a waiver.¹ Payment in full with knowledge of defects,² or taking possession of a building,³ does not of itself waive a right of action for damages. Such conduct may, however, be evidence of such waiver.⁴ Permitting⁵ or requiring⁶ contractors to complete a building after the time limited for performance, or accepting goods delivered after the time fixed for performance,⁷ does not waive damages for such delay. So accepting property delivered after the time fixed for testing has expired does not waive a right of action for damages for breach of warranty.⁸ Accepting chattels offered under a contract of sale with warranty, either express⁹ or implied,¹⁰ does not waive the right of action for damages if the chattels do not correspond to the warranty. If no implied warranty exists, no liability remains after acceptance.¹¹

§1510. Acceptance under practical compulsion.

The justice of the rule that acceptance after breach, even though a waiver of the right to treat such breach as discharge,¹ is not a waiver of a right of action for damages is apparent when it is considered that the party not in default is often con-

¹ Flannery v. Rohrmayer, 46 Conn. 558; 33 Am. Rep. 36; Cannon v. Hunt, 116 Ga. 452; 42 S. E. 734; Underwood v. Wolf, 131 Ill. 425; 19 Am. St. Rep. 40; 23 N. E. 598; Brady v. Cassidy, 145 N. Y. 171; 39 N. E. 814.

² Flannery v. Rohrmayer, 46 Conn. 558; 33 Am. Rep. 36.

³ Cannon v. Hunt, 116 Ga. 452; 42 S. E. 734.

⁴ Flannery v. Rohrmayer, 46 Conn. 558; 33 Am. Rep. 36.

⁵ Bryson v. McCone, 121 Cal. 153; 53 Pac. 637.

⁶ Johnson v. Henry, 127 Mich. 548; 86 N. W. 1027.

⁷ Redlando, etc., Association v. Gorman, 161 Mo. 203; 54 L. R. A. 718; 61 S. W. 820.

⁸ Underwood v. Wolf, 131 Ill. 425; 19 Am. St. Rep. 40; 23 N. E. 598.

⁹ Morse v. Moore, 83 Me. 473; 23 Am. St. Rep. 783; 13 L. R. A. 224; 22 Atl. 362.

¹⁰ Frith v. Hollan, 133 Ala. 583; 91 Am. St. Rep. 54; 32 So. 494.

¹¹ Brick used in building. Wisconsin Red Pressed Brick Co. v. Hood, 67 Minn. 329; 64 Am. St. Rep. 418; 69 N. W. 1091.

¹ Brady v. Cassidy, 145 N. Y. 171; 39 N. E. 814.

strained by his necessities to take what he can get under his contract when he can get it.² Such conduct does not and should not operate as a waiver of the right of action for damages.³ Thus A sold timber to B and by the same contract gave to B the right to use A's sawmill. B made contracts to sell and deliver timber to others. A subsequently took possession of the mill and refused to surrender it to B. In order to fill his contracts, B furnished timber to the mill and received lumber therefor. Such conduct did not waive B's right to sue for breach of contract.⁴ So if defective machinery is erected under a contract for first-class machinery and the vendee can do nothing better than accept it and use it, he does not waive his claim for damages.⁵ So if A has engaged a theatrical company to give a performance in his theatre, has sold tickets and invested the proceeds in advertising, his acceptance of the performance does not waive his right to claim damages.⁶ Where a contract to pay extra compensation to induce performance waives damages for the breach which induced such promise for extra compensation is a question upon which there is a conflict of authority. Some courts hold that such a contract impliedly bars a right of action on the original contract;⁷ others, that it does not as a matter of law.⁸ So as it is the duty of the party not in default to take proper steps to mitigate damages, such conduct does not amount to a waiver of damages. Thus A had agreed to refine B's sugar. A was unable to perform and contracted with X to refine it, B's conduct in acquiescing in such agreement is not a waiver of a claim for damages.⁹

² Garfield, etc., Co. v. R. R., 166 Mass. 119; 44 N. E. 119.

³ Bucklin v. Davidson, 155 Pa. St. 362; 26 Atl. 643.

⁴ Bucklin v. Davidson, 155 Pa. St. 362; 26 Atl. 643.

⁵ Payne v. Lumber Co., 110 La. 750; 34 So. 763.

⁶ Charley v. Potthoff, 118 Wis. 258; 95 N. W. 124.

⁷ Where A agreed to furnish B such silver plated ware as he should order for the season of 1879 and

A delivered some and received payment and refused to deliver the rest except at a higher price and B agreed to pay such price, B cannot sue A for breach of the original contract. Rogers v. Rogers, 139 Mass. 440; 1 N. E. 122.

⁸ Endriss v. Ice Co., 49 Mich. 279. (Such question was here held to be one of fact to be passed upon by the jury.)

⁹ Avery v. Sugar Co., 111 La. 891; 35 So. 967.

CHAPTER LXXI.

ALTERATION.

§1511. Nature of alteration.

Alteration as the term is generally used in Contract Law is a change in the language of a written instrument after execution, made intentionally by one of the parties thereto without the consent of the other. Alteration in this sense must be distinguished from other changes in the wording of a written instrument which do not amount to an alteration and have none of its effects.

§1512. Alteration distinguished from modification before execution.

(1) A written instrument has no legal effect until execution, and therefore until it is executed its language may be changed at the pleasure of the party drafting it, subject, of course, to the qualification in case of contracts that the adversary party must assent to the instrument in its final form to give it validity. Alteration before delivery makes the contract as delivered the true contract as between the parties thereto, prior negotiations, including the contract as drafted, being merged by the delivery of the contract as ultimately agreed upon.¹ On the same principle alteration of a deed with the consent of the parties and before delivery,² or alteration after delivery if followed by redelivery,³ does not affect its validity. Putting revenue stamps

¹ Pelton v. Lumber Co., 113 Cal. 21; 45 Pac. 12; Bucki v. Seitz, 39 Fla. 55; 21 So. 576; Winkles v. Guenther, 98 Ga. 472; 25 S. E. 527; Prather v. Zulauf, 38 Ind. 155.

² Date of notary's certificate altered. Miller v. Williams, 27 Colo. 34; 59 Pac. 740.

³ Abbott v. Abbott, 189 Ill. 488; 82 Am. St. Rep. 470; 59 N. E. 958.

on a shipping receipt is not in law an erasure of the provisions covered by such stamps, so as to prevent them from being a part of the contract.⁴ Alteration before final delivery discharges parties to the altered instrument who did not consent to such alteration, if the alteration affects their rights in any substantial way.⁵ If A is the maker of a note, B a payee and X a party to the note for the accommodation of A, a change made before final delivery by A, by the consent of A and B, but without X's consent, will discharge X.⁶ Indorsers of a note given by a corporation may set up an alteration made by the president of the corporation after indorsement but before delivery.⁷

§1513. Alteration distinguished from modification after execution by mutual consent.

(2) A change in the language of a written instrument after execution with the assent of all the parties thereto, operates as a discharge of the original contract and the substitution of a new contract therefor.¹ Thus with the consent of the parties an alteration changing the amount of indebtedness,² changing the rate of interest,³ or adding an agreement to a deed that a lien is retained to secure the purchase-money notes,⁴ does not discharge the instrument. Authority to make such alteration may be implied. Thus an agreement to release certain guaran-

⁴ *Sloman v. Express Co.*, — Mich. —; 95 N. W. 999.

⁵ *State v. McGonigle*, 101 Mo. 353; 20 Am. St. Rep. 609; 8 L. R. A. 735n; 13 S. W. 758.

⁶ *Pelton v. Lumber Co.*, 113 Cal. 21; 45 Pac. 12; *Aetna National Bank v. Winchester*, 43 Conn. 391; *Draper v. Wood*, 112 Mass. 315; 17 Am. Rep. 92; *Aldrich v. Smith*, 37 Mich. 468; 26 Am. Rep. 536; *Ruby v. Talbott*, 5 N. M. 251; 3 L. R. A. 724; 21 Pac. 72; *Ohio Valley Bank v. Lockwood*, 13 W. Va. 392; 31 Am. Rep. 768.

⁷ *Pelton v. Lumber Co.*, 113 Cal. 21; 45 Pac. 12.

¹ *Phillips v. Crips*, 108 Ia. 605; 79 N. W. 373; *Mathias v. Leathers*, 99 Ia. 18; 68 N. W. 449; *Boston v. Benson*, 12 Cush. (Mass.) 61; *Bryant v. Bank*, 107 Tenn. 560; 64 S. W. 895; *Schmelz v. Rix*, 95 Va. 509; 28 S. E. 890; *Kane v. Herman*, 109 Wis. 33; 85 N. W. 140.

² Increasing it. *Mathias v. Leathers*, 99 Ia. 18; 68 N. W. 449.

³ *Phillips v. Crips*, 108 Ia. 605; 79 N. W. 373.

⁴ *Bryant v. Bank*, 107 Tenn. 560; 64 S. W. 895.

tors gives implied authority to cancel their names from negotiable notes which might be transferred to *bona fide* holders.⁵ This rule applies, of course, only to such parties to the contract as consent to such change. If an alteration is made with the consent of two of the parties to the contract, but without the consent of a third party thereto, such third party is discharged by such alteration.⁶

§1514. Alteration distinguished from spoliation.

(3) A change in the language of a written instrument by one not a party thereto and not acting with authority of a party thereto constitutes spoliation. It must be considered separately from alteration. Since the distinction between alteration and spoliation turns on the relation to the contract borne by the party who makes the change in the instrument, it is in this connection all important to determine this relation. Change in a written contract may be made by (1) a party to the contract, (2) an agent of a party to the contract, (3) a person not an agent but in whose custody a contract has been placed, or (4) a person having no relation to the contract. If the change is made by a party to the contract it is a case of alteration.¹ If the change is made by an agent of a party to the contract the question whether this is an alteration or a spoliation as far as the principal's rights are concerned turns on the question of the agent's authority. If the agent is one having no authority which could include the making of such change, he is for this purpose a stranger to the contract, and the change is a spoliation if not ratified by the principal.² So an unauthorized change

⁵ Kane v. Herman, 109 Wis. 33; 35 N. W. 140.

⁶ See §§ 1520, 1543.

¹ See § 1518 *et seq.*

² Forbes v. Taylor, 139 Ala. 286; 35 So. 855; Aetna National Bank v. Winchester, 43 Conn. 391; Ballard v. Ins. Co., 81 Ind. 239; Brooks v. Allen, 62 Ind. 401; Kingan v. Silvers, 13 Ind. App. 80; 37 N. E. 413; Nickerson v. Swett, 135 Mass. 514;

White Sewing Machine Co. v. Dakin, 86 Mich. 581; 13 L. R. A. 313; 49 N. W. 583; Lubbering v. Kohlbrecher, 22 Mo. 596; Hunt v. Gray, 35 N. J. L. 227; 10 Am. Rep. 232; Gleason v. Hamilton, 138 N. Y. 353; 21 L. R. A. 210; 34 N. E. 283; Rees v. Overbaugh, 6 Cow. (N. Y.) 746; Robertson v. Hay, 91 Pa. St. 242; Port Huron, etc., Co. v. Sherman, 14 S. D. 461; 85 N. W. 1008;

as to the place of payment of a note, made by payee's clerk and subsequently erased, leaving the note as originally written, does not avoid it.³ Accordingly, the removal of a memorandum written by an unauthorized agent extending the time of payment eight months, is an immaterial alteration.⁴ So an authorized alteration by the agent of the maker does not avoid the note,⁵ or contract.⁶ On the other hand a change in a written contract made by an agent within whose general authority the power to make such change is included, is in legal effect an alteration made by the principal.⁷

A change in the language of a written contract made by one in whose custody a contract is placed but who is not the agent of either party, is a spoliation. Thus if a public bond is placed in the custody of a public officer, a change therein made by him is a spoliation.⁸ Alteration of a note by a justice of the peace with whom it has been left for collection, does not destroy its validity where the payee disavows such alteration as soon as he learns of it.⁹ The cases can be explained on the theory that the depository, even if in one sense the agent of one of the parties to the instrument, had no authority to make such alteration. Accordingly, any act done by him within his general authority which effects a change in the language of the written instrument is an alteration. A change made by an administrator in a note payable to himself in that capacity is an alteration, and not a spoliation.¹⁰ So a public official authorized to approve a bond, who changes it after execution at the time that he approves it, commits an alteration, and not a spoliation.¹¹

A change made by a

Deering Harvester Co. v. White, 110 Tenn. 132; 72 S. W. 962; *Bigelow v. Stilphen*, 35 Vt. 521; *Jesup v. City Bank*, 14 Wis. 331.

³ *Acme Harvester Co. v. Butterfield*, 12 S. D. 91; 80 N. W. 170.

⁴ *Mater v. Bank*, 8 Colo. App. 325; 46 Pac. 221.

⁵ *Walsh v. Hunt*, 120 Cal. 46; 39 L. R. A. 697; 52 Pac. 115.

⁶ *Young v. Wright*, 4 Wis. 144; 65 Am. Dec. 303.

⁷ *Hollingsworth v. Holbrook*, 80

Ia. 151; 20 Am. St. Rep. 411; 45 N. W. 561; *Gettysburg National Bank v. Chisolm*, 169 Pa. St. 564; 47 Am. St. Rep. 929; 32 Atl. 730.

⁸ *State v. Berg*, 50 Ind. 496.

⁹ *Hays v. Odom*, 79 Mo. App. 425.

¹⁰ *McMurtrey v. Sparks*, 71 Mo. App. 126.

¹¹ *State v. McGonigle*, 101 Mo. 353; 20 Am. St. Rep. 609; 8 L. R. A. 735; 13 S. W. 758.

mere stranger to the contract, who has no relation thereto, is a spoliation.¹²

§1515. Effect of spoliation.

The original English rule was that even spoliation by a stranger to the contract avoided it.¹ The rule in the United States is that spoliation by a stranger to the contract does not avoid it and has no effect in law. The original contract if proved, is to be enforced as if no spoliation had been made.² The practical difficulties incident to any reliance on secondary evidence, when the primary evidence is destroyed, are occasionally encountered where the spoliation has been thorough.

§1516. Correction of mistake as alteration.

To constitute alteration the contract must be so changed as to express an intention different from the real agreement of the parties. The effect of alteration of a contract containing mistake in expression by which alteration such contract is made to conform to the real agreement of the parties, presents some questions for consideration. If the parties agree to such informal reformation there is no question as to its validity.¹ If the parties have not agreed to such correction, the right of one party to constitute himself chancellor and to decree reformation in an *ex parte* proceeding on his own evidence, without notice

¹² Shirley v. Swafford, 119 Ga. 43; 45 S. E. 722; see § 1515.

¹ Pigot's Case, 11 Coke 26b; Waugh v. Bussell, 5 Taunt. 707; Trew v. Burton, 1 Crompt. & M. 533; Davidson v. Cooper, 13 M. & W. 343.

² Andrews v. Calloway, 50 Ark. 358; 7 S. W. 449; Pry v. Pry, 109 Ill. 466; Condict v. Flower, 106 Ill. 105; Paterson v. Higgins, 58 Ill. App. 268; Piersol v. Grimes, 30 Ind. 129; 95 Am. Dec. 673; Lee v. Alexander, 9 B. Mon. (Ky.) 25; 48 Am. Dec. 412; Ferguson v. White (Miss.), 18 So. 124; State v. Pemiscott County v. Scott, 104 Mo.

26; 15 S. W. 987; 17 S. W. 11; Lubbering v. Kohlbrecher, 22 Mo. 596; Moore v. Ivers, 83 Mo. 29; Schlageck v. Widholm, 59 Neb. 541; 81 N. W. 448; Bingham v. Shadle, 45 Neb. 82; 63 N. W. 143; Casoni v. Jerome, 58 N. Y. 315; Martin v. Insurance Co., 101 N. Y. 498; 5 N. E. 338; Solon v. Bank, 114 N. Y. 134; Van Brunt v. Eoff, 35 Barb. (N. Y.) 501; Tarbill v. Mill Works, 1 Ohio C. D. 643; Murray v. Peterson, 6 Wash. 418; 33 Pac. 969; Yeager v. Musgrave, 28 W. Va. 90; Bryant v. Bank, 107 Tenn. 560; 64 S. W. 895.

to the adversary party, and to execute his decree forthwith is more questionable. It has been held, however, that as between the parties to the contract who knew of the mistake, such alteration does not avoid the contract.² So an instrument is not avoided in equity by such alteration.³ Thus an alteration in the rate of interest, as a change from eight per cent as printed to seven and a half per cent as the parties had agreed upon,⁴ or a change in words importing liability, as a change from words importing individual liability to words importing corporate liability incurred through the individuals signing the notes as agents for the corporation, to conform to the real intention of the parties,⁵ a change in the name of the payee,⁶ or a change in the date,⁷ do not avoid the contract if made to correct a mistake in expression. This principle has been extended to cases where the party sought in good faith to modify the instrument so as to conform to the intention of the parties, but for some reason failed in his alteration to express the real intention of the parties. Thus an innocent alteration of the date of the note, made in good faith, to correspond to the date of delivery under the belief that the parties intended such date, does not avoid the contract.⁸ So a *bona fide* alteration in a memorandum of guaranty, made by guarantee without the knowledge of the guarantor, intended to correct an error in the amount of the debt, but which did not state the correct amount does not avoid the memorandum the debt being otherwise iden-

² Sill v. Reese, 47 Cal. 294; Ryan v. Bank, 148 Ill. 349; 35 N. E. 120; Duker v. Franz, 7 Bush. (Ky.) 273; 3 Am. Rep. 314; Nickerson v. Swett, 135 Mass. 517; Ames v. Colburn, 11 Gray (Mass.) 390; 71 Am. Dec. 723; Bank v. Carson, 60 Mich. 432; 27 N. W. 589; Goode-nov v. Curtis, 33 Mich. 505; McRaven v. Crisler, 53 Miss. 542; Kountz v. Kennedy, 63 Pa. St. 187; 3 Am. Rep. 541; McLaughlin v. Venine, 2 Wyom. 1.

³ McClure v. Little, 15 Utah 379; 62 Am. St. Rep. 938; 49 Pac. 298.

⁴ Osborn v. Hall, 160 Ind. 153; 66 N. E. 457.

⁵ Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577; 58 N. E. 162.

⁶ Derby v. Thrall, 44 Vt. 413; 8 Am. Rep. 389.

⁷ Ames v. Colburn, 11 Gray (Mass.) 390; 71 Am. Dec. 723.

⁸ Wallace v. Tice, 32 Or. 283; 51 Pac. 733; citing Bowers v. Jewell, 2 N. H. 543; Booth v. Powers, 56 N. Y. 22; Kountz v. Kennedy, 63 Pa. St. 187; 3 Am. Rep. 541.

tified.⁹ Such an alteration will, however, discharge a party to the written instrument who did not know of the real contract between the parties and was not a party thereto. Thus a change in the date to conform to the agreement of the maker and payee releases an accommodation indorser.¹⁰ So a change after indorsement but before delivery, changing the place of payment to another state, releases an accommodation party.¹¹ In some jurisdictions, however, it is held that a mistake in expression cannot be corrected by the action of one party alone, and that such a correction is an alteration, avoiding the contract if material;¹² though ordinarily not fraudulent.

§1517. Unintentional change not alteration.

To constitute an alteration the change in the language of the written instrument must have been made intentionally. If not intentional, it is not an alteration.¹ Placing internal revenue stamps on the face of a shipping receipt is not the erasure or alteration of any part of such receipt or contract covered thereby.² So if a waiver of demand and notice and a guaranty of payment is affixed with a stamp and by mistake is placed above the signature of an indorser who did not waive or guarantee, instead of over the signature of the one who did, this does not discharge such indorser.³ So if by mistake an indorsement is cancelled on the wrong note,⁴ or one who means to sign as surety signs in the place appropriate for a witness,⁵ the contract is not thereby discharged. In the foregoing cases thereby was no intent to make the alteration in question at all. The

⁹ Lee v. Butler, 167 Mass. 426; 57 Am. St. Rep. 466; 46 N. E. 52.

¹⁰ McMillan v. Hefferlin, 18 Mont. 385; 45 Pac. 548.

¹¹ Pelton v. Lumber Co., 113 Cal. 21; 45 Pac. 12.

¹² Murray v. Graham, 29 Ia. 520; Letcher v. Bates, 6 J. J. Mar. (Ky.) 524; 22 Am. Dec. 92; Evans v. Foreman, 60 Mo. 449; Hunt v. Gray, 35 N. J. L. 227; 10 Am. Rep.

232; Smith v. Smith, 27 S. C. 166; 13 Am. St. Rep. 633; 3 S. E. 78.

¹ Sloman v. Express Co., — Mich. —; 95 N. W. 999; Rhoads v. Frederick, 8 Watts (Pa.) 448.

² Sloman v. Express Co., — Mich. —; 95 N. W. 999.

³ Gordon v. Bank, 144 U. S. 97.

⁴ Brett v. Marsten, 45 Me. 401.

⁵ Fisher v. King, 153 Pa. St. 3; 25 Atl. 1029.

mistake was analogous to a mistake in execution.⁶ The principle has been extended to alterations which the party making them intended to make, but such intention was caused by mistake of fact as to some collateral material fact.⁷ So if a holder believing that an instrument is to be paid,⁸ or has been paid,⁹ cancels it, such cancellation is not such alteration as discharges it. So an alteration made through a mistake of law while attempting to accomplish some lawful purpose, has been held not to discharge the contract. An example of this is found where one wishes to transfer a negotiable instrument and attempts to do so by substituting the name of the indorsee for that of the original payee.¹⁰ If a guarantor by inadvertence signs his name in such a way as to indicate *prima facie* that he is an original promisor, the contract is not discharged thereby.¹¹

§1518. Classes of alterations.—Material alterations.

Alterations are to be classified upon two different bases. They may as to their effect upon the instrument, be material or immaterial; and as to the purpose with which they are made they may be fraudulent or innocent. A material alteration is one which in some way changes the legal effect of the instrument.¹ Precedents determining whether specific changes are material or immaterial must be used with great caution, since it is only by determining the legal effect of the instrument before the alteration and after the alteration that it is possible to decide whether the change is material or not. As will be seen from comparing examples of material and immaterial alterations, a specific change may be a material alteration in

⁶ See § 71 *et seq.*

⁷ This is analogous in nature to mistake in inducement, § 155, though its effects are different.

⁸ *Novell v. Rossi*, 2 B. & Ad. 757.

⁹ *Lowmore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188.

¹⁰ *Horst v. Wagner*, 43 Ia. 373; 22 Am. Rep. 255.

¹¹ *Wallace v. Jewell*, 21 O. S. 163; 8 Am. Rep. 48.

¹ *Hall v. McHenry*, 19 Ia. 521; 87 Am. Dec. 451; *Hartley v. Corboy*, 150 Pa. 23; 24 Atl. 295; *Craighead v. McLoney*, 99 Pa. 211; *Derby v. Thrall*, 44 Vt. 413; 8 Am. Rep. 389; *Bigelow v. Stilphen*, 35 Vt. 521; *Hoffman v. Bank*, 99 Va. 480; 39 S. E. 134.

one contract and an immaterial alteration in another. The rules here given are merely general statements, subject to the exception of particular forms of contract.

§1519. Change in parties.

A change in the parties to the instrument is generally a material alteration.¹ A change in the name of the promisor is a material alteration.² Thus adding "& Co." to the maker's signature is a material alteration.³ Thus erasure of the name of the maker of the instrument releases a co-maker who does not assent thereto.⁴ So where one surety's name was erased and another one was added, a surety who did not consent thereto is released from the bond⁵ or note⁶ which he had signed. A signed a note after delivery. His name was subsequently erased. As parties to the note would be entitled to hold A, the erasure avoids the note.⁷ So a change in the name of the promisee is a material alteration,⁸ such as the substitution of the name of the husband for that of his wife as payee,⁹ or the addition of "junior" to the name of the payee in a note, making it thereby payable to a different person.¹⁰ However, where

¹ *Montgomery v. Crosthwait*, 90 Ala. 553; 24 Am. St. Rep. 832; 12 L. R. A. 140; 8 So. 498; *State v. McGonigle*, 101 Mo. 353; 20 Am. St. Rep. 609; 8 L. R. A. 735; 13 S. W. 758; *Donkle v. Milem*, 88 Wis. 33; 59 N. W. 586.

² *Davis v. Coleman*, 7 Ired. L. (N. C.) 424.

³ *Montgomery v. Crosthwait*, 90 Ala. 553; 24 Am. St. Rep. 832; 12 L. R. A. 140; 8 So. 498; and see *Wilde v. Armsby*, 6 Cush. (Mass.) 314.

⁴ *Martin v. Thomas*, 24 How. (U. S.) 315; *Smith v. United States*, 2 Wall. (U. S.) 219.

⁵ *Smith v. United States*, 2 Wall. (U. S.) 219; *State v. McGonigle*, 101 Mo. 353; 20 Am. St. Rep. 609; 8 L. R. A. 735; 13 S. W. 758. (As the substituted surety signed,

meaning only to be one of several sureties, he, too, is released.)

⁶ *Davis v. Coleman*, 7 Ired. L. (N. C.) 424.

⁷ *Bank v. Weidenbeck*, 87 Fed. 271. (Hence it releases directors from personal liability for not filing a corporate report.)

⁸ Promissory note. *Bell v. Mahin*, 69 Ia. 408; 29 N. W. 331; *Erikson v. Bank*, 44 Neb. 622; 48 Am. St. Rep. 753; 28 L. R. A. 577; 62 N. W. 1078; *Davis v. Bauer*, 41 O. S. 257; *Hoffman v. Bank*, 99 Va. 480; 39 S. E. 134. Mileage book. *Holden v. Ry.*, 73 Vt. 317; 50 Atl. 1096.

⁹ *Sneed v. Sabinal, etc., Co.*, 71 Fed. 493; 18 C. C. A. 213; affirmed on rehearing, 73 Fed. 925.

¹⁰ *Broughton v. Fuller*, 9 Vt. 373.

the indorsee of a note drew a line through the name of the payees, inserted his own name and had the payees indorse it over to him, it was held that there was **no material alteration**.¹¹

§1520. Addition of new party.

The addition of a party to an instrument as co-obligor is generally held to be a material alteration which discharges prior makers who have not assented to such addition.¹ While it is not necessary to prove that an alteration is prejudicial to the party discharged thereby in order to show that it is material, the possibility of prejudice in case of such addition of a new party has been suggested to be that such alteration, if valid, might change the jurisdiction before which the original obligor could be brought.² The courts are nearly unanimous in their application of this principle to the case of sureties. If A executes an instrument as principal and B executes it as a co-obligor, as surety for A, the addition of a new party to the instrument as co-obligor without B's consent discharges B.³ Some exceptions exist to this rule. If the law provides for additional sureties, the prior sureties are presumed to contract with full knowledge that subsequent sureties may be added, and they are therefore not discharged by such addition. Thus where the statute authorized the county board to require either an additional bond or additional sureties on the original bond of the county treasurer, and additional sureties are required and sign their names, the original sureties are not released.⁴ In some

¹¹ Hence recovery could be had thereon after it was restored to its original form. *James v. Tilton*, 183 Mass. 275; 67 N. E. 326.

¹ *Gardner v. Walsh*, 5 El. & Bl. 83; *Reid v. Humphrey*, 6 Ont. App. 403; *Hochmark v. Richler*, 16 Colo. 263; 26 Pac. 818; *Hamilton v. Hooper*, 46 Ia. 515; 26 Am. Rep. 161; *Browning v. Gosnell*, 91 Ia. 448; 59 N. W. 340; *Sullivan v. Rudisill*, 63 Ia. 158; 18 N. W. 856; *Allen v. Dornan*, 57 Mo. App. 288; *Bank v. Myers*, 50 Mo. App. 157;

Harper v. Stroud, 41 Tex. 367.

² *Shipp v. Suggett*, 9 B. Mon. (Ky.) 15; *Wallace v. Jewell*, 21 O. S. 163; 8 Am. Rep. 48.

³ *Houck v. Graham*, 106 Ind. 195; 55 Am. Rep. 727; 6 N. E. 594; *Browning v. Gosnell*, 91 Ia. 448; 59 N. W. 340; *Hall v. McHenry*, 19 Ia. 521; 87 Am. Dec. 451; *Wallace v. Jewell*, 21 O. S. 163; 8 Am. Rep. 48. *Contra*, *Brey v. Hagan*, 110 Ky. 566; 96 Am. St. Rep. 464; 62 S. W. 1.

⁴ *Holt County v. Scott*, 53 Neb.

cases the fact that the additional sureties signed as sureties for all prior parties and not as co-sureties with the original sureties,⁵ or that they signed as guarantors,⁶ has been held not to discharge a prior surety. Whether the addition of a surety or co-obligor without the consent of the principal avoids the contract as to him is a question upon which the courts have divided. The weight of authority is that such alteration discharges the principal.⁷ The party signing last is, of course, bound even if the principal resists liability successfully, provided such party understood the circumstances under which he signed.⁸ Still less does such addition release the party last signing if the principal does not resist the enforcement of liability against himself.⁹ Other authorities hold that the addition of a surety without the principal's consent does not discharge the principal.¹⁰ The English courts at first held that such addition did not discharge the original maker;¹¹ but this case was subsequently overruled and the view that the principal was discharged was adhered to.¹² The Supreme Court of the United States has laid down the rule that the addition of the name of a surety does not discharge the principal.¹³ The

176; 73 N. W. 681 (especially where the later sureties are rejected).

⁵ Bowser v. Rendell, 31 Ind. 128.

⁶ McCaughey v. Smith, 27 N. Y. 39. (Held by a divided court, a majority of which did not agree on any legal proposition not to discharge an indorser.)

⁷ Brown v. Johnson, 127 Ala. 292; 85 Am. St. Rep. 134; 51 L. R. A. 403; 28 So. 579; (overruling Montgomery Railroad Co. v. Hurst, 9 Ala. 513; Rudolph v. Brewer, 96 Ala. 189; 11 So. 314); Soaps v. Eichberg, 42 Ill. App. 375; Nicholson v. Combs, 90 Ind. 515; 46 Am. Rep. 229; Singleton v. McQuerry, 85 Ky. 41; 2 S. W. 652; Shipp v. Suggett, 9 B. Mon. (Ky.) 5; Lunt v. Silver, 5 Mo. App. 186; Harper v. Stroud, 41 Tex. 367; Ford v.

Bank (Tex. Civ. App.), 34 S. W. 684.

⁸ Favorite v. Stidham, 84 Ind. 423; Browning v. Gosnell, 91 Ia. 448; 59 N. W. 340; Hamilton v. Hooper, 46 Ia. 515; 26 Am. Rep. 161.

⁹ Brownell v. Winnie, 29 N. Y. 400; 86 Am. Dec. 314.

¹⁰ Rudolph v. Brewer, 96 Ala. 189; 11 So. 314; R. R. Co. v. Hurst, 9 Ala. 513; Evans v. Partin (Ky.), 56 S. W. 648; Union Banking Co. v. Martin, 113 Mich. 521; 71 N. W. 867; Royse v. Bank, 50 Neb. 16; 69 N. W. 301; Bank v. Job, 48 Neb. 774; 67 N. W. 781.

¹¹ Catton v. Simpson, 8 Ad. & El. 136.

¹² Gardner v. Walsh, 5 El. & Bl. 83.

¹³ Mersman v. Werges, 112 U. S.

real question involved was whether such alteration discharged a mortgage given to secure such altered note, and it was held that the mortgage was not discharged. Accordingly the holding in *Mersman v. Werges* has subsequently been treated as an obiter by the circuit court;¹⁴ but this case was reversed by the circuit court of appeals.¹⁵ The additional signature in this case was, however, that of a guarantor, which is not a material alteration.

§1521. Change in subject-matter.

A change in the amount of the note increasing it,¹ or decreasing it,² changing a recital in a note that it was given for the purchase price of buildings "on" lot one so as to read, "and" lot one;³ adding to an insurance policy after loss that it covers "shelving counters and drawers," even though the loss on the building alone exceeds the face of the policy;⁴ or adding property to a bill of sale⁵ or chattel mortgage⁶ are all material alterations. Inserting the word "gold" before "dollars" in a promise to pay money, is a material alteration.⁷ So adding

139. (The added signature was a forgery of the name of the maker's wife.)

¹⁴ *Bank v. Weidenbeck*, 87 Fed. 271.

¹⁵ *Bank v. Weidenbeck*, 97 Fed. 896; 38 C. C. A. 131.

¹ *Schofield v. Londesborough* (1895), 1 Q. B. 536; *Green v. Sneed*, 101 Ala. 205; 46 Am. St. Rep. 119; 13 So. 277; *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18; 3 S. W. 892; *Knoxville National Bank v. Clark*, 51 Ia. 264; 33 Am. Rep. 129; 1 N. W. 491; *Bank v. Wangerin*, 65 Kan. 423; 59 L. R. A. 717; 70 N. W. 330; *Burrows v. Klunk*, 70 Md. 451; 14 Am. St. Rep. 371; 3 L. R. A. 576; 17 Atl. 378; *Cape Ann National Bank v. Burns*, 129 Mass. 596; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; 25 Am. Rep. 67; *Wade v. Withington*, 1

All. (Mass.) 561; *Warder, etc., Co. v. Willyard*, 46 Minn. 531; 24 Am. St. Rep. 250; 49 N. W. 300; *Ruby v. Talbott*, 5 N. M. 251; 3 L. R. A. 724; 21 Pac. 72; *Searles v. Seipp*, 6 S. D. 472; 61 N. W. 804; *Matteson v. Ellsworth*, 33 Wis. 488; 14 Am. Rep. 766.

² *Johnston v. May*, 76 Ind. 293; *Doane v. Eldridge*, 16 Gray (Mass.) 254; *Portage County Branch Bank v. Lane*, 8 O. S. 405.

³ *Richardson v. Fellner*, 9 Okla. 513; 60 Pac. 270.

⁴ *Phoenix Insurance Co. v. McKernan*, 100 Ky. 97; 37 S. W. 490.

⁵ *Babb v. Clewson*, 10 Serg. & R. (Pa.) 419; 13 Am. Dec. 684.

⁶ *Bacon v. Hooker*, 177 Mass. 335; 83 Am. St. Rep. 279; 58 N. E. 1078.

⁷ *Foxworthy v. Colby*, 64 Neb. 216; 62 L. R. A. 393; 89 N. W. 800.

over a blank indorsement: "For value received we hereby guaranty the payment of the within note and waive presentment for payment, demand, and notice of protest," and "to be exchanged for railroad bonds," are both material alterations.⁸

§1522. Change in rate of interest.

A change in the rate of interest,¹ increasing² or diminishing³ the rate; or inserting the rate of interest which had been left blank, if the rate inserted is different from the legal rate;⁴ or adding a clause increasing the interest rate after maturity;⁵ adding an interest clause where there was none before,⁶ or erasing an interest clause that was originally inserted⁷ is a material alteration.

§1523. Change in date.

Changes in the date of the instrument,¹ either antedating² or post-dating³ it; or a change in the period of maturity, making

⁸ Hartnett v. Holdrege, — Neb. —; 97 N. W. 443.

¹ Bowman v. Mitchell, 79 Ind. 84; Schnewind v. Hackett, 54 Ind. 248; Shanks v. Albert, 47 Ind. 461; Holmes v. Trumper, 22 Mich. 427; 7 Am. Rep. 661; Citizens' National Bank v. Williams, 174 Pa. St. 66; 35 L. R. A. 464; 34 Atl. 303; Boustead v. Cuyler, 116 Pa. 551.

² Palmer v. Poor, 121 Ind. 135; 6 L. R. A. 469; 22 N. E. 984; Harsh v. Klepper, 28 O. S. 200; Sanders v. Bagwell, 32 S. C. 238; 7 L. R. A. 743; 10 S. E. 946.

³ Keene v. Weeks, 19 R. I. 309; 33 Atl. 446.

⁴ Hoopes v. Collingwood, 10 Colo. 107; 3 Am. St. Rep. 565; 13 Pac. 909; Derr v. Keaough, 96 Ia. 397; 65 N. W. 359; Draper v. Wood, 112 Mass. 315; 17 Am. Rep. 92.

⁵ Farmers', etc., Bank v. Novich, 89 Tex. 381; 34 S. W. 914.

⁶ Bowman v. Mitchell, 79 Ind. 84; Jones v. Bangs, 40 O. S. 139; 48

Am. Rep. 664; Gettysburg National Bank v. Chisolm, 169 Pa. St. 564; 47 Am. St. Rep. 929; 32 Atl. 731; McVey v. Ely, 5 Lea (Tenn.) 438.

⁷ Moore v. Hutchinson, 69 Mo. 429.

¹ Wood v. Steele, 6 Wall. (U. S.) 80; Lesser v. Scholze, 93 Ala. 338; 9 So. 273; Mitchell v. Ringgold, 3 Harr. & J. (Md.) 159; 5 Am. Dec. 433; Johnson v. Johnson, 66 Mich. 525; McMurtrey v. Sparks, 71 Mo. App. 126; McMillan v. Hefferlin, 18 Mont. 385; 45 Pac. 548; Brown v. Straw, 6 Neb. 536; 29 Am. Rep. 369; Rogers v. Vosburgh, 87 N. Y. 228; Newman v. King, 54 O. S. 273; 56 Am. St. Rep. 705; 35 L. R. A. 471; 43 N. E. 683; Stephens v. Graham, 7 Serg. & R. (Pa.) 505; 10 Am. Dec. 485; Bell v. Boyd, 76 Tex. 133; 13 S. W. 232.

² Seebold v. Tatlie, 76 Minn. 131; 78 N. W. 967.

³ Boulton v. Langmuir, 24 Ont. App. 618; Wood v. Steele, 6 Wall.

maturity come earlier⁴ or later⁵ than that fixed by the original contract; changing the period for which interest is to run, either making it begin earlier,⁶ as by changing the period of interest from "from maturity" to "from date,"⁷ or by delaying it,⁸ adding "fixed," which excludes days of grace,⁹ or adding that certain orders should be filled in thirty days,¹⁰ are all material alterations.

§1524. Change in attesting witnesses.

Adding the names of attesting witnesses, where such addition may in any way change the legal effect of the instrument,¹ as where execution may be proved by such witness or by proof of his signature if he is dead or beyond seas,² or such addition may prolong the period of limitations;³ or removing the name of a subscribing witness placed there originally,⁴ is a material alteration.

§1525. Change in negotiability.

Adding the words "or order"¹ or the words "bearer"²

(U. S.) 80; *Newman v. King*, 54 O. S. 273; 56 Am. St. Rep. 705; 35 L. R. A. 471; 43 N. E. 683.

⁴ *Hartley v. Corboy*, 150 Pa. St. 23; 24 Atl. 295; *Crockett v. Thomason*, 5 Sneed (Tenn.) 342.

⁵ *Stayner v. Joice*, 82 Ind. 35; *Bank v. Payne* (Ky.), 42 S. W. 736; *Flanigan v. Phelps*, 42 Minn. 186; 43 N. W. 1113.

⁶ *Brooks v. Allen*, 62 Ind. 401.

⁷ *Sheley v. Sampson*, 5 Kan. App. 465; 46 Pac. 994.

⁸ *Coburn v. Webb*, 56 Ind. 96; 26 Am. Rep. 15.

⁹ *Steinau v. Moody*, 100 Ga. 136; 28 S. E. 30.

¹⁰ *United States Glass Co. v. Bot-tle Co.*, 81 Fed. 993.

¹ *White Sewing Machine Co. v. Saxon*, 121 Ala. 399; 25 So. 784; *Brckett v. Mountfort*, 11 Me. 115; *Adams v. Frye*, 3 Metc. (Mass.) 103; *Homer v. Wallis*, 11 Mass.

309; 6 Am. Dec. 169. *Contra*, *Blackwell v. Lane*, 20 N. C. (4 Dev. & B. L.) 113; 32 Am. Dec. 675; *Henning v. Werkheiser*, 8 Pa. St. 518; *Foust v. Renno*, 8 Pa. St. 378; *Marshall v. Gougler*, 10 Serg. & R. (Pa.) 164; *Fuller v. Green*, 64 Wis. 159; 54 Am. Rep. 600; 24 N. W. 907.

² *White Sewing Machine Co. v. Saxon*, 121 Ala. 399; 25 So. 784.

³ *Homer v. Wallis*, 11 Mass. 309; 6 Am. Dec. 169.

⁴ *Sharpe v. Bagwell*, 1 Dev. Eq. (N. C.) 115.

¹ *Hollis v. Vandegrift*, 5 Houst. (Del.) 521; *Burch v. Daniel*, 101 Ga. 228; 28 S. E. 622; *Johnson v. Bank*, 2 B. Mon. (Ky.) 310; *Haines v. Dennett*, 11 N. H. 180; *Pepoon v. Stagg*, 1 Nott. & McC. (S. C.) 102; *Taylor v. Moore* (Tex.), 20 S. W. 53.

² *McCauley v. Gordon*, 64 Ga.

to the name of the payee of an instrument which thereby is made negotiable, or changing the words "or order" to "or bearer,"³ or inserting "jointly and severally"⁴ are material alterations.

§1526. Change in place of performance.

A change in the place of performance,¹ such as making a note payable at a certain bank,² or adding a provision that delivery of goods sold should be made to a common carrier,³ is a material alteration.

§1527. Change in memoranda on instrument.

A question sometimes presented for adjudication is whether an alteration of a memorandum in writing on the same piece of paper as the written contract, but not in the body thereof is a material alteration. If the writing thus altered is in legal effect a part of the contract a change therein is a material alteration.¹ Thus cutting off an application for insurance from the top of a promissory note to secure assessments, even if a perforated line was originally upon the paper between the ap-

221; 37 Am. Rep. 68; Scott v. Walker, Dudley (Ga.) 243; Johnson v. Bank, 2 B. Mon. (Ky.) 310; Crosswell v. Labree, 81 Me. 44; 10 Am. St. Rep. 238; 16 Atl. 331; Simmons v. Atkinson, 69 Miss. 862; 23 L. R. A. 599; 12 So. 263; Walton Plow Co. v. Campbell, 35 Neb. 173; 16 L. R. A. 468; 52 N. W. 883.

³ Needles v. Shaffer, 60 Ia. 65; Belknap v. Bank, 100 Mass. 376; 97 Am. Dec. 105; Booth v. Powers, 56 N. Y. 22; Marshall v. Wilhite, 2 Ohio C. D. 500; Bank v. Roberts, 45 Wis. 373.

⁴ Bank v. Wharton, 27 N. S. 67.

¹ Winter v. Pool, 100 Ala. 503; 14 So. 411; Pahlman v. Taylor, 75 Ill. 629; McCoy v. Lockwood, 71 Ind. 319; Charlton v. Reed, 61 Ia.

166; 47 Am. Rep. 808; 16 N. W. 64; Sturges v. Williams, 9 O. S. 443; 75 Am. Dec. 473.

² Pope v. Bank, 23 Ind. App. 210; 54 N. E. 835; Woodworth v. Bank, 19 Johns. (N. Y.) 391; 10 Am. Dec. 239.

³ Brady v. Coal Mining Co., 106 Fed. 824; 45 C. C. A. 662. (By interlining "f. o. b. cars at mine" to show the place of delivery.) See also Brady v. Coal Mining Co., 94 Fed. 28.

¹ Payne v. Long, 121 Ala. 385; 25 So. 780; Cochran v. Nebeker, 48 Ind. 459; Scofield v. Ford, 56 Ia. 370; 9 N. W. 309; Benedict v. Cowden, 49 N. Y. 396; 10 Am. Rep. 382; Rochford v. McGee, — S. D. —; 61 L. R. A. 335; 94 N. W. 695.

plication and the note,² or cutting off from the bottom of a note "subject to a settlement between us,"³ are each material alterations. On the other hand an indorsement on the back of a note, added after delivery,⁴ such as an indorsement of partial payment,⁵ is no part of the note, and adding a date to such indorsement⁶ or erasing it, even if done fraudulently,⁷ is not a material alteration. If, however, one claims title through an indorsement, it is as to him, a material part of the contract. Hence if an indorsement "for collection"⁸ is cancelled, this is a material change, and a subsequent purchaser of the note from such indorsee is put on inquiry.

§1528. Other changes in written contracts

Other changes in written contracts which modify the legal effect thereof may be material alterations. Thus a waiver of exemptions written over a blank indorsement,¹ adding "protest waived" to an indorsement,² or striking out a condition so as to leave the promise absolute,³ are all material alterations. So the addition of a word such as "his"⁴ which may make the subject-matter specific instead of general is a material alteration. An interlineation in a note to the effect that a vendor's lien is reserved on the land for which the note is given is not an immaterial alteration as a matter of law, since the deed may have waived the lien.⁵

² *Rochford v. McGee*, — S. D. —; 61 L. R. A. 335; 94 N. W. 695.

³ *Payne v. Long*, 121 Ala. 385; 25 So. 780.

⁴ *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77; 41 Am. Rep. 193.

⁵ *Howe v. Thompson*, 11 Me. 152; *Theopold Mercantile Co. v. Deike*, 76 Minn. 121; 77 Am. St. Rep. 607; 78 N. W. 977.

⁶ *Howe v. Thompson*, 11 Me. 152.

⁷ *Theopold Mercantile Co. v. Deike*, 76 Minn. 121; 77 Am. St. Rep. 607; 78 N. W. 977.

⁸ *Cussen v. Brandt*, 97 Va. 1; 75 Am. St. Rep. 762; 32 S. E. 791.

¹ *Jordan v. Long*, 109 Ala. 414; 19 So. 843.

² *Davis v. Eppler*, 38 Kan. 629; 16 Pac. 793; *Schwartz v. Wilmer*, 90 Md. 136; 44 Atl. 1059.

³ *Tate v. Fletcher*, 77 Ind. 102.

⁴ *Consumers' Ice Co. v. Jennings*, 100 Va. 719; 42 S. E. 879.

⁵ *McDaniel v. Whitsett*, 96 Tenn. 10; 33 S. W. 567.

§1529. Effect of material alteration on liability on contract.

A material alteration avoids the written contract.¹ Thus a material alteration of a contract,² though with the consent of the other parties thereto,³ releases a surety thereon. It is, however, error to restrict the effect of a material alteration as discharge to the case of sureties.⁴ Any material alteration releases a party who does not consent thereto, no matter how many other parties have consented. This is so whether the alteration is fraudulent or innocent.⁵ It makes no difference whether the change makes the contract less favorable or more favorable⁶ to the adversary party. A material alteration avoids a contract not only as to the party making it, but as to an innocent transferee, such as a *bona fide* assignee who is not an indorsee.⁷ A negotiable instrument which has been altered materially is unenforceable, even in the hands of a *bona fide* holder without notice who takes for value and before maturity.⁸

¹ Wood v. Steele, 6 Wall. (U. S.) 80; Payne v. Long, 121 Ala. 385; 25 So. 780; Montgomery v. Crossthwait, 90 Ala. 553; 24 Am. St. Rep. 832; 12 L. R. A. 140; 8 So. 498; Anderson v. Bellenger, 87 Ala. 334; 13 Am. St. Rep. 46; 4 L. R. A. 680; 6 So. 82; Palmer v. Poor, 121 Ind. 135; 6 L. R. A. 469; 22 N. E. 984; Haskell v. Champion, 30 Mo. 136; Ball v. Beaumont, — Neb. —; 92 N. W. 170; Newman v. King, 54 O. S. 273; 56 Am. St. Rep. 705; 35 L. R. A. 471; 43 N. E. 683; Consumers' Ice Co. v. Jennings, 100 Va. 719; 42 S. E. 879. See cases cited in §§ 1518-1528.

² Carrique v. Beaty, 24 Ont. App. 302; State Solicitor's Co. v. Savage, 39 Fla. 703; 23 So. 413.

³ United States Glass Co. v. Bottle Co., 81 Fed. 993; Thompson v. Massie, 41 O. S. 307.

⁴ Ball v. Beaumont, —Neb. —; 92 N. W. 170.

⁵ Green v. Sneed, 101 Ala. 205;

46 Am. St. Rep. 119; 13 So. 277; Hall v. McHenry, 19 Ia. 521; 87 Am. Dec. 451; Fay v. Smith, 1 All. (Mass.) 477; 79 Am. Dec. 752; Harsh v. Klepper, 28 O. S. 200; Richardson v. Fellner, 9 Okla. 513; 60 Pac. 270. Apparently *contra*, Wolferman v. Bell, 6 Wash. 84; 36 Am. St. Rep. 126; 32 Pac. 1017.

⁶ Brown v. Johnson, 127 Ala. 292; 85 Am. St. Rep. 134; 51 L. R. A. 403; 28 So. 579; Weir Plow Co. v. Walmsley, 110 Ind. 242; 11 N. E. 232; Humphreys v. Guillow, 13 N. H. 385; 38 Am. Dec. 499.

⁷ Burch v. Daniel, 101 Ga. 228; 28 S. E. 622; Searles v. Seipp, 6 S. D. 472; 61 N. W. 804.

⁸ Fordyce v. Kosminski, 49 Ark. 40; 4 Am. St. Rep. 18; 3 S. W. 892; Ofenstein v. Bryan, 20 App. D. C. 1; Derr v. Keaough, 96 Ia. 397; 65 N. W. 339; Knoxville National Bank v. Clark, 51 Ia. 264; 33 Am. Rep. 129; 1 N. W. 491; Bank v. Wangerin, 65 Kan. 423; 59 L. R.

While in some of the cases in which a *bona fide* holder has not been allowed to recover on an altered negotiable instrument, the alteration was apparent on the face of the instrument,⁹ the doctrine does not rest upon this ground. As long as the maker has not been negligent in giving opportunity for alteration¹⁰ alteration discharges the instrument, even if it is so skilfully done as to deceive a prudent man.¹¹ Even if the maker signs a note separated by a perforated line from the rest of the contract it is held that he is not necessarily negligent.¹² In some jurisdictions, however, an innocent material alteration does not avoid the contract.¹³

§1530. Immaterial alterations.

An immaterial alteration is one which does not change the legal effect of the written instrument.¹ Thus the addition of a provision fixing the rate of interest at the legal rate where no rate had been fixed in the written contract;² change of the rate of interest in excess of the rate fixed by the written

A. 717; 70 Pac. 330; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; 25 Am. Rep. 67; *Wade v. Withington*, 1 All. (Mass.) 561; *Seebold v. Tatlie*, 76 Minn. 131; 78 N. W. 967; *Simmons v. Lampton Co.*, 69 Miss. 862; 23 L. R. A. 599; 12 So. 263; *Newman v. King*, 54 O. S. 273; 56 Am. St. Rep. 705; 35 L. R. A. 471; 43 N. E. 683; *Citizens' National Bank v. Williams*, 174 Pa. St. 66; 35 L. R. A. 464; 34 Atl. 304; *Bank v. Novich*, 89 Tex. 381; 34 S. W. 914.

⁹ *Citizen's National Bank v. Williams*, 174 Pa. St. 66; 35 L. R. A. 464; 34 Atl. 304.

¹⁰ *Bank v. Novich*, 89 Tex. 381; 34 S. W. 914.

¹¹ *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18; 3 S. W. 892; *Bank v. Wangerin*, 65 Kan. 423; 59 L. R. A. 717; 70 Pac. 330; *Mid-
daugh v. Elliott*, 61 Mo. App. 601;

Rochford v. McGee, — S. D. —; 61 L. R. A. 335; 94 N. W. 695.

¹² *Rochford v. McGee*, — S. D. —; 61 L. R. A. 335; 94 N. W. 695.

¹³ *Croswell v. Labree*, 81 Me. 44; 10 Am. St. Rep. 238; 16 Atl. 331; *Wolferman v. Bell*, 6 Wash. 84; 36 Am. St. Rep. 126; 32 Pac. 1017. So in Georgia by statute. *Miller v. Slade*, 116 Ga. 772; 43 S. E. 69; *Burch v. Pope*, 114 Ga. 334; 40 S. E. 227.

¹ *Carlisle v. Bank*, 122 Ala. 446; 26 So. 115; *Bucklen v. Huff*, 53 Ind. 474; *Huff v. Cole*, 45 Ind. 300; *Laub v. Rudd*, 37 Ia. 617; *Bank v. Hyde*, 131 Mass. 77; 41 Am. Rep. 193; *Moore v. Bank*, 22 Mo. App. 684; *First National Bank v. Mack*, 35 Or. 122; 57 Pac. 326; *Bank v. Evans*, 9 W. Va. 373.

² *Port Huron First National Bank v. Carson*, 60 Mich. 432; 27 N. W. 589.

contract where such rate was the highest allowed by law;³ adding "or order" to an indorsement in blank;⁴ adding "or bearer" to an instrument which is non-negotiable because subject to conditions;⁵ and adding "payment guaranteed" over the signature of an indorser where the note waives presentment, notices and protest,⁶ are immaterial alterations. So where days of grace are allowed only on bills of exchange or on notes placed on the same footing, the addition of the word "fixed" to the date of maturity of a note, thereby providing against days of grace, has been held to be an immaterial alteration in case the note is never put on the footing of a bill of exchange by being discounted at a bank, though it was payable at a bank and might have been put on the footing of a bill of exchange.⁷ Since marginal figures are no part of a note⁸ an alteration in such marginal figures,⁹ as changing them from \$1,500 to \$1,000,¹⁰ or from \$600 to \$650,¹¹ is not a material alteration. Inserting an additional provision which has been performed before such insertion, as a provision for security, which is already given,¹² or an agreement to become surety on a renewal note, which has already been done,¹³ is immaterial. So the erasure from a building contract of a recital of receipt of the first payment, which has not in fact been made, is immaterial, since such term is not contractual and could have been contradicted by extrinsic evidence.¹⁴ In a contract be-

³ Keene v. Miller, 103 Ky. 628; 45 S. W. 1041. *Contra*, Harsh v. Klepper, 28 O. S. 200.

⁴ Weaver v. Bromley, 65 Mich. 212; 31 N. W. 839.

⁵ Goodenow v. Curtis, 33 Mich. 505.

⁶ Iowa Valley State Bank v. Sigstad, 96 Ia. 491; 65 N. W. 407.

⁷ Tranter v. Hibberd, 108 Ky. 265; 56 S. W. 169.

⁸ Merritt v. Boyden, 191 Ill. 136; 85 Am. St. Rep. 246; 60 N. E. 907; Smith v. Smith, 1 R. I. 398; 53 Am. Dec. 652.

⁹ Prim v. Hammel, 134 Ala. 652;

92 Am. St. Rep. 52; 32 So. 1006; Horton v. Horton, 71 Ia. 448; 32 N. W. 452; Johnston Harvester Co. v. McLean, 57 Wis. 258; 46 Am. Rep. 39; 15 N. W. 177.

¹⁰ Prim v. Hammel, 134 Ala. 652; 92 Am. St. Rep. 52; 32 So. 1006.

¹¹ Schryver v. Hawks, 22 O. S. 308.

¹² J. I. Case, etc., Co. v. Ebbighausen, 11 N. D. 466; 92 N. W. 826.

¹³ Bank v. Miner, 9 Colo. App. 361; 48 Pac. 837.

¹⁴ Sullivan v. Realty Co., 142 Cal. 201; 75 Pac. 767.

tween property owners and the contractor for grading a street which provided that each owner was to pay in proportion to his interest in the abutting property, an interlineation was made, "Each party hereto to pay only such parts of the total cost as his front footage bears to the total frontage improved in said street." Such interlineation was held to be immaterial.¹⁵ The addition to the correct description of realty in a mortgage the words "containing one hundred sixty acres more or less," which is the correct number, has been held immaterial.¹⁶ The addition of an internal revenue stamp has been held to be an immaterial alteration of a note payable in Massachusetts, since the Massachusetts courts have held that the provision of the Federal statutes making such instruments inadmissible in evidence if a revenue stamp is not affixed, applies only to the Federal courts and not the state courts.¹⁷

§1531. Addition of memoranda.

A memorandum made upon the same piece of paper as a written contract but not intended as a part thereof, is not a material alteration;¹ such as a pencil memorandum which on its face does not purport to be a part of the instrument, noting the bank where payment is to be made² or otherwise noting the place of payment;³ or a memorandum added to an assignment of an insurance policy to the effect that the loan for which the assignment was given was to be repaid on notice of thirty or sixty days by the assignee;⁴ or a memorandum written across

¹⁵ *Young v. Borzone*, 26 Wash. 4; 66 Pac. 135.

¹⁶ *Gunter v. Addy*, 58 S. C. 178; 36 S. E. 553.

¹⁷ *Rowe v. Bowman*, 183 Mass. 488; 67 N. E. 636.

¹ *Mente v. Townsend*, 68 Ark. 391; 59 S. W. 41; *State Solicitors' Co. v. Savage*, 39 Fla. 703; 23 So. 413; *Carr v. Welch*, 46 Ill. 88; *Light v. Killinger*, 16 Ind. App. 102; 59 Am. St. Rep. 313; 44 N. E. 760; *White v. Johns*, 24 Minn. 387.

² *Light v. Killinger*, 16 Ind. App. 102; 59 Am. St. Rep. 313; 44 N. E. 760. Apparently *contra*, *Woodworth v. Bank*, 19 Johns. (N. Y.) 391; 10 Am. Dec. 239; a memorandum of payment being treated as *prima facie* a part of the contract and hence a material alteration.

³ *American National Bank v. Bangs*, 42 Mo. 450; 97 Am. Dec. 349.

⁴ *Mente v. Townsend*, 68 Ark. 391; 59 S. W. 41.

the face of a fifteen hundred dollar note that it was to be paid to another, amount reduced to one thousand dollars.⁵ So a memorandum concerning interest written upon the instrument,⁶ as a memorandum by the payee, "I hereby agree to accept five (5) per cent annual interest on the within bond from June 1st, 1890,"⁷ or an indorsement made by one who has purchased realty encumbered by mortgage, made on the note evidencing the mortgage debt, whereby he agrees to pay seven per cent interest instead of six per cent,⁸ is not a material alteration.

§1532. Effect of immaterial alteration on liability on contract.

An immaterial alteration does not avoid a written contract.¹ This is true whether the alteration was made innocently or fraudulently.² In some authorities it has been said that even

⁵ State Solicitor's Co. v. Savage, 39 Fla. 703; 23 So. 413.

⁶ Carr v. Welch, 46 Ill. 88; Littlefield v. Coombs, 71 Me. 110; Edward Thompson Co. v. Baldwin, 62 Neb. 530; 87 N. W. 307; Tremper v. Hemphill, 8 Leigh (Va.) 623; 31 Am. Dec. 673.

⁷ Reed v. Culp, 63 Kan. 595; 66 Pac. 616.

⁸ Boutelle v. Carpenter, 182 Mass. 417; 65 N. E. 799.

¹ Oakland First National Bank v. Wolff, 79 Cal. 69; 21 Pac. 551-748; Nichols v. Johnson, 10 Conn. 192; Shirley v. Swafford, 119 Ga. 43; 45 S. E. 722; Ryan v. Bank, 148 Ill. 349; 35 N. E. 1120; McKibben v. Newell, 41 Ill. 461; Reed v. Kemp, 16 Ill. 445; Shuck v. State, 136 Ind. 63; 35 N. E. 993; State *ex rel.* Jackson Township v. Berg, 50 Ind. 496; Rowley v. Jewett, 56 Ia. 492; 9 N. W. 353; Briscoe v. Reynolds, 51 Ia. 673; 2 N. W. 529; Shelton v. Deering, 10 B. Mon. (Ky.) 405; Terry v. Hazlewood, 1 Duv. (Ky.) 104; Hottinger v. Hottinger, 49 La. Ann. 1633; 22

So. 847; Granite Ry. Co. v. Bacon, 15 Pick. (Mass.) 239; Smith v. Crooker, 5 Mass. 538; Goodenow v. Curtis, 33 Mich. 505; Herrick v. Baldwin, 17 Minn. 209; 10 Am. Rep. 161; Bridges v. Winters, 42 Miss. 135; 2 Am. Rep. 598; 97 Am. Dec. 443; Heman v. Gilliam, 171 Mo. 258; 71 S. W. 163; Fisherdict v. Hutton, 44 Neb. 122; 62 N. W. 488; Palmer v. Largent, 5 Neb. 223; 25 Am. Rep. 479; Burnham v. Ayer, 35 N. H. 351; Pequawket Bridge v. Mathes, 8 N. H. 139; Flint v. Craig, 59 Barb. (N. Y.) 319; Robertson v. Hay, 91 Pa. St. 242; Blair v. Bank, 11 Humph. (Tenn.) 84; Churchill v. Bieistein, 9 Tex. Civ. App. 445; Langdon v. Paul, 20 Vt. 217.

² Vogel v. Ripper, 34 Ill. 100; 85 Am. Dec. 298; Magers v. Dunlap, 39 Ill. App. 618; Robinson v. Ins. Co., 25 Ia. 430; Commonwealth v. Bank, 98 Mass. 12; 93 Am. Dec. 126. "An immaterial alteration cannot be made material simply by intent." Robinson v. Ins. Co., 25 Ia. 430, 435. "When men's as-

an immaterial alteration avoids a written contract.³ Thus it has been said that even an immaterial alteration in a money-bearing or title-bearing obligation avoids it.⁴ In some cases this statement is obiter as the alteration is held to be material,⁵ or was made to correct a mistake in expression,⁶ or the cases are cases of spoliation.⁷ The actual adjudications are almost all to the effect that an immaterial alteration is without legal effect, even if fraudulent.

§1533. Right of recovery upon original consideration.—Innocent material alteration.

In cases of material alteration, where the written contract is discharged, the question then arises as to whether recovery can be had on the original consideration for which the instrument was given. This depends on whether the alteration was made innocently or fraudulently. If it was made innocently, recovery can be had on the original consideration.¹

§1534. Fraudulent material alteration.

If the alteration is made fraudulently no recovery can be had upon the original consideration.¹ It seems to be held in

cannot be the subject of judicial investigation their motives cannot be inquired into." *Moye v. Herndon*, 30 Miss. 110, 121.

³ 1 *Greenleaf on Ev.*, § 568; 2 *Parson's Notes & Bills*, 572; *Bishop on Cont.*, § 755, the latter author saying "Where in making an immaterial alteration, he means, a fraud, yet, mistaking the law does not accomplish his purpose the other party will, in reason, be discharged."

⁴ *Kelly v. Thuey*, 143 Mo. 422; 45 S. W. 300; affirming in banc, 37 S. W. 516.

⁵ *United States Glass Co. v. Bottle Co.*, 81 Fed. 993; *Crockett v. Thomason*, 5 Sneed (Tenn.) 342.

⁶ *Turner v. Billagram*, 2 Cal. 520.

⁷ *Lumbering v. Kohlbrecher*, 22 Mo. 596.

¹ *Bank v. Wharton*, 27 N. S. 67; *Hampton v. Mayers*, 3 Ind. Terr. 65; 53 S. W. 483; *Hunt v. Gray*, 35 N. J. L. 227; 10 Am. Rep. 232; *Savage v. Savage*, 36 Or. 268; 59 Pac. 461; *Keene v. Weeks & Aldrich*, 19 R. I. 309; 33 Atl. 446; *Otto v. Halff*, 89 Tex. 384; 59 Am. St. Rep. 56; 34 S. W. 910; *Matte-son v. Ellsworth*, 33 Wis. 488; 14 Am. Rep. 766.

¹ *White v. Hass*, 32 Ala. 430; 70 Am. Dec. 548; *Maguire v. Eichmeier*, 109 Ia. 301; 80 N. W. 395; *Hocknell v. Sheley*, 66 Kan. 357; 71 Pac. 839; *Warder, etc., Co. v. Will-yard*, 46 Minn. 531; 24 Am. St. Rep. 250; 49 N. W. 300; *Whitmer v.*

some cases, however, that even in cases of fraudulent material alterations the maker cannot avoid the note and at the same time retain the consideration received therefor. Thus a note given in consideration of a deed to realty was subsequently altered fraudulently. The maker could avoid the transaction but could not avoid the note and affirm the deed.²

§1535. Effect of alteration of collateral instrument.

Whether the alteration of one contract affects another contract or instrument in some way connected with the former instrument is a question sometimes presented for consideration. A material alteration in one of two instruments secured by a mortgage does not discharge the other.¹ A material alteration of some of a series of notes given under a conditional contract of sale does not avoid the contract of sale or the rest of the notes.² An alteration which avoids a mortgage does not avoid the note to secure which it was given.³ Whether the alteration of a note discharges the mortgage given to secure the note depends on the nature of the alteration and the purpose with which it was made. An immaterial alteration would, of course, have no effect on either note or mortgage. Such an alteration does not, therefore, discharge the mortgage. A material alteration, if innocent, discharges the written contract, but leaves the obligor thereon liable for the original consideration received by him, and the mortgage remains as a valid security for such debt.⁴ On the other hand, a material fraudulent alteration

Frye, 10 Mo. 348; Walton Plow Co. v. Campbell, 35 Neb. 173; 16 L. R. A. 468; 62 N. W. 1078; Martendale v. Follett, 1 N. H. 95; Bank of Decorah v. Laughlin, 4 N. D. 391; 61 N. W. 473; Bigelow v. Stilphen, 35 Vt. 521; Newell v. Mayberry, 3 Leigh (Va.) 250; 23 Am. Dec. 261.

² Glover v. Green, 96 Ga. 126; 22 S. E. 664. See for similar facts, Singleton v. McQuerry, 85 Ky. 41; 2 S. W. 652.

¹ Parke, etc., Co. v. Lumber Co. 110 Cal. 658; 43 Pac. 202.

² Edward Thompson Co. v. Baldwin, 62 Neb. 530; 87 N. W. 307.

³ Kime v. Jesse, 52 Neb. 606; 72 N. W. 1050.

⁴ Elliott v. Blair, 47 Ill. 342; Clough v. Seay, 49 Ia. 111; Baskin v. Wayne, 62 Mo. App. 515; Gillett v. Powell, Speers Eq. (S. C.) 142; Plyler v. Elliott, 19 S. C. 257; Smith v. Smith, 27 S. C. 166; 13 Am. St. Rep. 633; 3 S. E. 78.

discharges the original liability and therefore discharges the mortgage.⁵

§1536. Who can take advantage of alteration as discharge.

Only the party who is apparently liable on the contract as altered can complain of the alteration. The party who makes the alteration cannot treat the contract as discharged if the adversary party seeks to enforce it.¹ Third persons cannot complain of such alteration if both parties to the contract acquiesce therein. So if an insurance company does not raise objection to an alteration in an insurance policy changing the beneficiary from the insured's "estate" to his "wife and children," his creditors cannot complain.²

§1537. Ratification of alteration.

The party who did not make the alteration may, if he choose, ratify it.¹ This principle has been applied to negotiable instruments such as promissory notes² and to leases.³ If the party against whom liability is sought to be enforced has full knowledge of the facts, he may ratify an alteration of a simple contract by express acquiescence therein,⁴ as by express promise to pay the note as altered,⁵ or by making part payment on the

⁵ *Bowman v. Mitchell*, 79 Ind. 84; *Tate v. Fletcher*, 77 Ind. 102; *Walton Plow Co. v. Campbell*, 35 Neb. 173; 16 L. R. A. 468; 52 N. W. 883; *Hocknell v. Sheley*, 66 Kan. 357; 71 Pac. 839. *Contra*, *Hoffman v. Molloy*, 91 Mo. App. 367; *Smith v. Smith*, 27 S. C. 166; 13 Am. St. Rep. 633; 3 S. E. 78; *Plyler v. Elliott*, 19 S. C. 257.

¹ *Lane v. Ry.*, — *Ida.* —; 67 Pac. 656; *Martin v. Ins. Co.*, 101 N. Y. 498; 5 N. E. 338.

² *Steeley's Creditors v. Steeley* (Ky.), 64 S. W. 642.

¹ *Barnsdall v. Boley*, 119 Fed. 191; *Goodspeed v. Cutler*, 75 Ill.

534; *Prouty v. Wilson*, 123 Mass. 297; *Jacobs v. Gilreath*, 45 S. C. 46; 22 S. E. 757; *Marks v. Schram*, 109 Wis. 452; 84 N. W. 830.

² *Pulliam v. Withers*, 8 Dana (Ky.) 98; 33 Am. Dec. 479; *Wester v. Bailey*, 118 N. C. 193; 24 S. E. 9; *Matlock v. Wheeler*, 29 Or. 64; 43 Pac. 867; *Marks v. Schram*, 109 Wis. 452; 84 N. W. 830.

³ *Barnsdall v. Boley*, 119 Fed. 191.

⁴ *Wester v. Bailey*, 118 N. C. 193; 24 S. E. 9.

⁵ *Goodspeed v. Cutler*, 75 Ill. 534; *Marks v. Schram*, 109 Wis. 452; 84 N. W. 830.

altered instrument,⁶ or by paying interest,⁷ or even by failure to disavow within a reasonable time after learning of the alterations.⁸ If the party against whom liability is sought to be enforced does not know of the alteration his conduct does not amount to a ratification.⁹ Thus an offer to renew and pay an altered note¹⁰ or part payment of such altered note,¹¹ is not ratification if made without knowledge of the fact of alteration. Sealed instruments stand on a somewhat different footing. In some jurisdictions the old rule that authority to execute a sealed instrument must be under seal is still in force. Where this rule obtains it follows necessarily that a ratification not under seal is ineffective in case of an alteration in a sealed instrument.¹² In other jurisdictions a sealed instrument may be executed or modified by authority not under seal. Where this rule obtains an oral ratification will validate an alteration in a sealed contract.¹³ Thus an offer to pay a bond and request for an extension of time, with knowledge of the alteration¹⁴ waives the right to treat such alteration as a ground of discharge.

§1538. Effect of subsequent restoration of contract to original form.

If a material alteration has once been made, and the written contract thereby discharged, if the adversary party wishes to take advantage thereof, the subsequent erasure of such alteration should not make the original contract valid. If the original alteration was made fraudulently and liability on the orig-

⁶ *Johnson v. Johnson*, 66 Mich. 525; 33 N. W. 413; *Evans v. Foreman*, 60 Mo. 449.

⁷ *Prouty v. Wilson*, 123 Mass. 297.

⁸ *Landwerlen v. Wheeler*, 106 Ind. 523; 5 N. E. 888; *Matlock v. Wheeler*, 29 Or. 64; 43 Pac. 867.

⁹ *Cutler v. Rose*, 35 Ia. 456; *Boalt v. Brown*, 13 O. S. 364; *McDaniel v. Whitsett*, 96 Tenn. 10; 33 S. W. 567.

¹⁰ *McDaniel v. Whitsett*, 96 Tenn. 10; 33 S. W. 567.

¹¹ *Payne v. Long*, 121 Ala. 385; 25 So. 780; *Jacobs v. Gilreath*, 45 S. C. 46; 22 S. E. 757.

¹² *Nesbitt v. Turner*, 155 Pa. St. 429; 26 Atl. 750; *Kilkelly v. Martin*, 34 Wis. 525.

¹³ *Dickson v. Bamberger*, 107 Ala. 293; 18 So. 290; *Fairhaven v. Cowgill*, 8 Wash. 687; 36 Pac. 1093.

¹⁴ *Dickson v. Bamberger*, 107 Ala. 293; 18 So. 290.

inal consideration was thereby discharged, this rule is recognized without dissent.¹ Thus a note is avoided by the addition of "with interest," even if erased before transfer to a *bona fide* holder.² In the case of innocent alterations some authorities hold that the erasure of such alteration restores the validity of the note.³ This rule has been applied even to sureties who could not have been held liable on the original consideration. Thus the addition, after surety has signed, of "with interest at 7 per cent" in accordance with an understanding with payee, and its erasure by payee without fraudulent intent do not release surety.⁴

§1539. Questions of law and fact.

Whether an alleged alteration has been made or not,¹ when it was made if at all,² and whether the adversary party consented to such alteration or not,³ are all questions of fact. Whether an alteration is material or immaterial is a question of law. It is therefore error to leave such question to the jury.⁴

§1540. Presumption as to date of alteration.

The alteration of a contract without the consent of the adversary is a wrongful act, at least when not the correction

¹ Locknane v. Emmerson, 11 Bush. (Ky.) 69; Bank v. Williams, 174 Pa. St. 66, 72; 35 L. R. A. 464; 34 Atl. 303, 304; McDaniel v. Whitsett, 96 Tenn. 10; 33 S. W. 567..

² Bank v. Williams, 174 Pa. St. 66, 72; 35 L. R. A. 464; 34 Atl. 303, 304.

³ Rogers v. Shaw, 59 Cal. 260.

⁴ McAlpin v. Clark, 11 Ohio C. C. 524.

¹ Wood v. Steele, 6 Wall. (U. S.) 80; Elbert v. McClelland, 8 Bush. (Ky.) 577; Conner v. Fleshman, 4 W. Va. 693.

² Wilson v. Hotchkiss, 81 Mich. 172; 45 N. W. 838; Cass County Bank v. Morrison, 17 Neb. 341; 52 Am. Rep. 417; 22 N. W. 782.

³ Cochran v. Nebeker, 48 Ind. 459; Stahl v. Berger, 10 S. & R. (Pa.) 170; 13 Am. Dec. 666.

⁴ Steele v. Spencer, 1 Pet. (U. S.) 552; Payne v. Long, 121 Ala. 385; 25 So. 780; Overton v. Matthews, 35 Ark. 146; 37 Am. Rep. 9. (This point not touched on in opinion in 37 Am. Rep. 9.) Heard v. Tappan, 116 Ga. 930; 43 S. E. 375; Milliken v. Marlin, 66 Ill. 13; Cochran v. Nebeker, 48 Ind. 459; Belfast Nat. Bank v. Harriman, 68 Me. 522; Fisher v. Hutton, 44 Neb. 122; 62 N. W. 488; Burnham v. Ayer, 35 N. H. 351; Stephens v. Graham, 7 Serg. & R. (Pa.) 505; 10 Am. Dec. 485; Kinard v. Glenn, 29 S. C. 590; 8 S. E. 203.

of a mistake in expression, and it is often a criminal act. Since criminal or wrongful conduct will not be presumed, the weight of authority is that alterations apparent on the face of the instrument do not of themselves raise any presumption of its invalidity.¹ Accordingly it is, under this rule, not necessary for the party relying upon the instrument to explain such alterations,² the burden of proof is upon the party attacking the instrument,³ and it is not proper to leave it for the jury to say upon mere inspection of the instrument whether there had been an alteration therein after execution.⁴ This rule is applied with especial force to alterations which are self-explanatory.⁵ It has been said that this rule cannot apply where the signature of an obligor has been erased, since this must have been made after execution.⁶ However, since it is not signing but delivery that constitutes execution, the reason alleged for this rule does not seem to exist; and the rule itself is not always followed.⁷ This rule has been applied even where the alteration is of a character markedly different from the rest of the instrument.⁸ In other jurisdictions it has been held that alterations are presumed to have been made after execution.⁹ The burden of proof is on the party claiming under such contract, to show when the alterations were made.¹⁰ This rule

¹ Klein v. Bank, 69 Ark. 140; 86 Am. St. Rep. 183; 61 S. W. 572; Gist v. Gans, 30 Ark. 285; Stayner v. Joyce, 120 Ind. 99; 22 N. E. 89; J. I. Case Threshing Machine Co. v. Peterson, 51 Kan. 713; 33 Pac. 470; Simpson v. Davis, 119 Mass. 269; 20 Am. Rep. 324; Willett v. Shepard, 34 Mich. 106; Wilson v. Hayes, 40 Minn. 531; 12 Am. St. Rep. 754; 4 L. R. A. 196; 42 N. W. 467; Hodge v. Scott, 1 Neb. Unofficial 619; 95 N. W. 837; Goodin v. Plugge, 47 Neb. 284; 66 N. W. 407; Franklin v. Baker, 48 O. S. 296; 27 N. E. 550.

² Klein v. Bank, 69 Ark. 140; 86 Am. St. Rep. 183; 61 S. W. 572.

³ Hart v. Sharpton, 124 Ala. 638; 27 So. 450; Galloway v. Bartholomew, — Or. —; 74 Pac. 467.

⁴ Merritt v. Boyden, 191 Ill. 136; 60 N. E. 907.

⁵ Hart v. Sharpton, 124 Ala. 638; 27 So. 450.

⁶ Blewett v. Bash, 22 Wash. 536; 61 Pac. 770.

⁷ Cass County v. Bank, 9 N. D. 263; 83 N. W. 12.

⁸ Graham v. Middleby, — Mass. —; 70 N. E. 416. Where the letter "s" in ink was added to the type-written word "contract."

⁹ Montag v. Linn, 23 Ill. 503; Sis-son v. Pearson, 44 Ill. App. 81; McAllister v. Avery, 17 Ill. App. 568.

¹⁰ Landt v. McCullough, 206 Ill. 214; 69 N. E. 107; affirming, 103 Ill. App. 668; Cole v. Hills, 44 N. H.

has been applied to receipts.¹¹ Evidence that such interlineations were made before the contract was signed and delivered is sufficient to justify the admission of such an instrument in evidence.¹²

§1541. Presumption as to whether alteration is fraudulent.

If the alteration is material, the question next presented is whether it is presumed to be fraudulent or not. A material alteration, not clearly beneficial to the obligor, is *prima facie* fraudulent.¹ An alteration increasing the rights of the obligee and the liabilities of the obligor, as increasing the amount of a note,² is *prima facie* fraudulent. If on the other hand the alteration reduces the rights of the obligee or the liabilities of the obligor, as reducing the rate of interest³ or erasing the name of a surety,⁴ it is *prima facie* not fraudulent. A change in the date of payment of a note has been held to be not fraudulent *prima facie*.⁵

§1542. Effect of negligence of obligor, making alteration possible.

If the maker of a negotiable instrument has executed it in such form as to make it easy to alter it so that the alteration cannot be detected by a transferee, some courts hold that in such cases the maker is estopped from setting up such alteration as a discharge or from denying that he executed the instrument in its altered form. This principle applies most clearly when blanks are left which the maker does not fill out at all,¹ such

227; Consumers' Ice Co. v. Jennings, 100 Va. 719; 42 S. E. 879.

¹¹ For insurance assessments. Rambousek v. Mystic Toolers, 119 Ia. 263; 93 N. W. 277. Receipt for payment for land. Bradley v. Lumber Co., 105 Wis. 245; 81 N. W. 394.

¹² Consumers' Ice Co. v. Jennings, 100 Va. 719; 42 S. E. 879.

¹ Crosswell v. Labree, 81 Me. 44; 10 Am. St. Rep. 238; 16 Atl. 331; Long v. Mason, 84 N. C. 15.

² Maguire v. Eichmeier, 109 Ia. 301; 80 N. W. 395; Warder, etc., Co. v. Willyard, 46 Minn. 531; 24 Am. St. Rep. 250; 49 N. W. 300.

³ Keene v. Weeks & Aldrich, 19 R. I. 309; 33 Atl. 446.

⁴ Cass County v. Bank, 9 N. D. 263; 83 N. W. 12.

⁵ Wolferman v. Bell, 6 Wash. 84; 36 Am. St. Rep. 126; 32 Pac. 1017.

¹ Porter v. Hardy, 10 N. D. 551; 88 N. W. 458.

as a blank for the date,² or for the place of payment,³ or a blank for the interest.⁴ In such cases it is possible to explain the decision on the theory that whatever the secret intention of the maker as to such blank, he must be presumed as to a *bona fide* holder to have given authority to fill in such blanks. This principle, however, has been applied by some courts to cases where the maker has inserted some appropriate words in the blank in question, but has done it so negligently that it is possible to add words in the residue of the blank, materially changing the legal effect of the instrument.⁵ These cases rest on an application of principles of estoppel. Other courts have held that the maker is not liable, even to a *bona fide* holder, where he has inserted words in blanks so negligently that an opportunity is given to insert other words,⁶ even if in a non-negotiable note.⁷ Other cases of alteration have been considered by the courts with the same difference of opinion. In some courts the maker is held though the contract has been materially altered, if he made such alteration possible by his negligence.⁸

² First State Savings Bank v. Webster, 121 Mich. 149; 79 N. W. 1068.

³ Cason v. Bank, 97 Ky. 487; 53 Am. St. Rep. 418; 31 S. W. 40.

⁴ Weidman v. Symes, 120 Mich. 657; 77 Am. St. Rep. 603; 79 N. W. 894.

⁵ Young v. Grote, 4 Bing. 253; Merritt v. Boyden, 191 Ill. 136; 85 Am. St. Rep. 246; 60 N. E. 907; Seibel v. Vaughan, 69 Ill. 257; Harvey v. Smith, 55 Ill. 224; Lowden v. Bank, 38 Kan. 533; 16 Pac. 748; Blakey v. Johnson, 13 Bush. (Ky.) 197; 26 Am. Rep. 254; Scotland County Nat. Bank v. O'Connell, 23 Mo. App. 165; Brown v. Reed, 79 Pa. 370; 21 Am. Rep. 75; Garrard v. Hadden, 67 Pa. 82; 5 Am. Rep. 412; Johnston Harvester Co. v. McLean, 57 Wis. 258; 46 Am. Rep. 39; 15 N. W. 177.

⁶ Schofield v. Londesborough

(1896), App. Cas. 514; (1895), 1 Q. B. 536 (referring in the opinion in the lower court to Young v. Grote, 4 Bing. 253, as a "fount of bad argument"); Fordyce v. Kosminski, 49 Ark. 40; 4 Am. St. Rep. 18; 3 S. W. 892; Conger v. Crabtree, 88 Ia. 436; 45 Am. St. Rep. 249; 55 N. W. 335; Knoxville Nat. Bank v. Clark, 51 Ia. 264; 33 Am. Rep. 129; 1 N. W. 491; Burrows v. Klunk, 70 Md. 451; 14 Am. St. Rep. 371; 3 L. R. A. 576; 17 Atl. 378; Greenfield Savings Bank v. Stowell, 123 Mass. 196; 25 Am. Rep. 67; Holmes v. Trumper, 22 Mich. 427; 7 Am. Rep. 661; Simmons v. Atkinson, etc., Co., 69 Miss. 862; 23 L. R. A. 599; 12 So. 263; Middaugh v. Elliot, 61 Mo. App. 601.

⁷ Searles v. Seipp, 6 S. D. 472; 61 N. W. 804.

⁸ Phelan v. Ross, 67 Pa. St. 59; Garrard v. Hadden, 67 Pa. St. 82.

Thus if the maker signs a contract with a part thereof written on the margin so that it can be removed without apparently changing the note;⁹ or if he signs a contract so drawn that part of it can be cut off and a promissory note left by such removal;¹⁰ or if he signs a note written in part in lead-pencil so that it can be easily erased,¹¹ and it is found as a fact that he was negligent in so signing such contract he is liable to a *bona fide* holder. In other courts the maker's negligence in writing a condition of a note on a stub, which was afterwards removed,¹² or in writing part of the contract below the maker's signature so that it can readily be removed,¹³ does not make him liable.

§1543. Modification of contract discharging surety.

The effect of a material modification of a contract agreed upon between the two adversary principals thereto without the consent of the sureties of one of such principals, is in some respects analogous to alteration, and requires a brief notice here. It is not usually a case of technical alteration, because the change is rarely made upon the face of the instrument; but in some respects the effect of such modification is the same as that of alteration. If one of two or more joint-parties to a contract is a surety, a modification of the contract made between his principal and the adversary party without the consent of the surety discharges the latter. The common form of modification exists where the principal obtains an extension of time by a valid contract.¹ So extension of time discharges a guar-

⁹ Cornell v. Nebeker, 58 Ind. 425; Zimmerman v. Rote, 75 Pa. St. 188.

¹⁰ Woollen v. Ulrich, 64 Ind. 120; Brown v. Reed, 79 Pa. St. 370; 21 Am. Rep. 75.

¹¹ Harvey v. Smith, 55 Ill. 224.

¹² Stephens v. Davis, 85 Tenn. 271; 2 S. W. 382.

¹³ Wait v. Pomeroy, 20 Mich. 425; 4 Am. Rep. 395.

¹ Union, etc., Ins. Co. v. Hanford, 143 U. S. 187; Landon v. English, 75 Ill. App. 483; Bugh v. Crum, 26

Ind. App. 465; 84 Am. St. Rep. 307; 59 N. E. 1076; Schieber v. Traudt, 19 Ind. App. 349; 49 N. E. 605; Roberson v. Blevins, 57 Kan. 50; 45 Pac. 63; Murray v. Marshall, 94 N. Y. 611; Calvo v. Davies, 73 N. Y. 211; 29 Am. Rep. 130; Jenkins v. Daniel, 125 N. C. 161; 74 Am. St. Rep. 632; 34 S. E. 239; Watauga Bank v. Matson, 99 Tenn. 390; 41 S. W. 1062; Schroeder v. Kinney, 15 Utah 462; 49 Pac. 894; Gillett v. Taylor, 14 Utah 190; 60 Am. St.

antor.² However, under a bond exacted by the government from a contractor under a public contract for the benefit of sub-contractors and material men, conditioned on the contractor's paying them "promptly," it has been held that the act of the material men in taking notes for thirty and sixty days does not discharge the surety.³ If A guarantees performance of a contract before it is made, he is released by a change in its terms from those guaranteed.⁴ In jurisdictions where A becomes a surety when X assumes A's debt to B, an extension of time given by B to X without A's consent discharges A.⁵ This principle does not, of course, apply where A does not under such circumstances become a surety, but remains primarily liable.⁶ If extension of time is relied upon as the alteration, there must be a binding contract for an extension. An implied contract for an extension of time will operate as a discharge as well as an express contract.⁷ An unenforceable promise to grant an extension does not, however, discharge the surety.⁸ Still less does mere delay, without any agreement therefor, discharge the surety in the absence of statute.⁹ In

Rep. 890; 46 Pac. 1099; *Bank v. Jeffs*, 15 Wash. 230; 46 Pac. 247; *Parsons v. Harrold*, 46 W. Va. 122; 32 S. E. 1002.

² *National Eagle Bank v. Hunt*, 16 R. I. 148; 13 Atl. 115.

³ (*United States Fidelity & Guaranty Co. v. Brick Co.*, 191 U. S. 416. This holding was based upon the peculiar character of the covenant, the surety having no idea when he entered into the contract when the respective payments would fall due.

⁴ *Page v. Krekey*, 137 N. Y. 307; 33 Am. St. Rep. 731; 21 L. R. A. 409; 33 N. E. 311.

⁵ *Herd v. Tuohy*, 133 Cal. 55; 65 Pac. 139; *Tuohy v. Woods*, 122 Cal. 665; 55 Pac. 683; *Schroeder v. Kinney*, 15 Utah 462; 49 Pac. 894.

⁶ *Denison University v. Manning*, 65 O. S. 138; 61 N. E. 607.

⁷ *Roberson v. Blevins*, 57 Kan. 50; 45 Pac. 63.

⁸ *Tatum v. Morgan*, 108 Ga. 336; 33 S. E. 940; *Bunn v. Bank*, 98 Ga. 647; 26 S. E. 63; *Heenan v. Howard*, 81 Ill. App. 629; *Olson v. Chism*, 21 Ind. App. 40; 51 N. E. 373; *Voris v. Shotts*, 20 Ind. App. 220; 50 N. E. 484; *Krupp v. Ritter Verein (Ky.)*, 53 S. W. 648; *Harburg v. Kumpf*, 151 Mo. 16; 52 S. W. 19; *Sully v. Childress*, 106 Tenn. 109; 82 Am. St. Rep. 875; 60 S. W. 499.

⁹ *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235; 18 Pac. 808; *Hall v. Pratt*, 103 Ga. 255; 29 S. E. 764; *Villars v. Palmer*, 67 Ill. 204; *Hall v. Bank*, 5 Kan. App. 493; 47 Pac. 566; *Forstall v. Fussell*, 50 La. Ann. 249, 256; 23 So. 273, 1012; *Gray v. Bank*, 81 Md. 631; 32 Atl. 518; *Colby v. Winger Co. v. Coon*, 116 Mich.

order that extension of time may operate as a discharge, the holder of the note must know when he contracts for the extension that one of the parties is a surety.¹⁰ If, however, he does not know of the fact of suretyship when he takes the note, but he does know of it when he grants the extension of time, he releases the surety.¹¹ If the surety assents to the extension of time, he is not discharged thereby.¹² Extension of time granted by a contract between the creditor and one co-surety does not discharge a non-consenting surety.¹³ If the creditor grants an extension of time and expressly reserves his right of action against the surety, the surety is held not to be discharged by such contract.¹⁴ To operate as a discharge, the contract to which the surety is a party must be modified. Thus a collateral contract for paying two per cent interest additional to that stipulated in the main contract does not release a surety on the main contract.¹⁵ A release of the principal debtor operates as a discharge of the surety,¹⁶ unless the creditor expressly reserves his right to hold the sureties.¹⁷

208; 74 N. W. 519; *Hefferlin v. Krieger*, 19 Mont. 123; 47 Pac. 638; *Bank v. McAllister*, 56 Neb. 188; 76 N. W. 552; *Eickhoff v. Eikenbary*, 52 Neb. 332; 72 N. W. 308; *Grier v. Flitercraft*, 57 N. J. Eq. 556; 41 Atl. 425; *Bailey Loan Co. v. Seward*, 9 S. D. 326; 69 N. W. 58; *Bank v. Matson*, 99 Tenn. 390; 41 S. W. 1062; *Weaver v. Ruhm* (Tenn. Ch. App.), 47 S. W. 171; *Wallace v. Richards*, 16 Utah 52; 50 Pac. 804; *First National Bank v. Parsons*, 45 W. Va. 688; 32 S. E. 271.

¹⁰ *Union, etc., Ins. Co. v. Hanford*, 143 U. S. 187; *Gillett v. Taylor*, 14 Utah 190; 60 Am. St. Rep. 890; 46 Pac. 1099; *Parsons v. Harrold*, 46 W. Va. 122; 32 S. E. 1002.

¹¹ *Zapalac v. Zapp*, 22 Tex. Civ. App. 375; 54 S. W. 938; *Gillett v. Taylor*, 14 Utah 190; 60 Am. St. Rep. 890; 46 Pac. 1099.

¹² *Williams v. Gooch*, 73 Ill. App. 557; *Barrett v. Davis*, 104 Mo. 549; 16 S. W. 377; *Kuhlman v. Leavens*, 5 Okla. 562; 50 Pac. 171.

¹³ *Merchants' Bank v. Bussell*, 16 Wash. 546; 48 Pac. 242.

¹⁴ *Hodges v. Land Co.*, 109 Ala. 617; 20 So. 23; *Dean v. Rice*, 63 Kan. 691; 66 Pac. 992; *Big Rapids National Bank v. Peters*, 120 Mich. 518; 79 N. W. 891; *Kaufman v. Rowan*, 189 Pa. St. 121; 42 Atl. 25; *Boston National Bank v. Jose*, 10 Wash. 185; 38 Pac. 1026.

¹⁵ *Stuts v. Strayer*, 60 O. S. 384; 71 Am. St. Rep. 723; 54 N. E. 368.

¹⁶ *Union National Bank v. Grant*, 48 La. Ann. 18; 18 So. 705; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; 35 Am. Dec. 322.

¹⁷ *Faneuil Hall National Bank v. Meloon*, 183 Mass. 66; 97 Am. St. Rep. 416; 66 N. E. 410.

CHAPTER LXXII.

BANKRUPTCY.

I. NATURE OF BANKRUPTCY.

§1544. Federal bankrupt acts.

The Constitution of the United States¹ gives to Congress the power to establish "uniform laws on the subject of bankruptcies throughout the United States." Under this grant of power Congress has enacted four distinct bankrupt acts which have been in force altogether only twenty-one years since the foundation of our present government.² The present bankrupt act took effect July 1, 1898, and was amended February 5, 1903. The Federal Bankrupt Act of 1898 is constitutional.³ A discharge given under the act of 1898 is valid throughout the United States.⁴

§1545. State bankrupt acts.

Various state bankrupt laws have been enacted which provide for granting discharges. These state bankrupt acts lack efficiency for several reasons. (1) The discharges granted by a state bankrupt court can have no extra-territorial effect.¹

¹ Art. I., § 8, paragraph 4.

² In *Hanover National Bank v. Moyses*, 186 U. S. 181, Fuller, C. J., gave the following list of Federal bankrupt acts as in force prior to the act of 1898: Act of 1800, 2 Stat. 19, C. 19. Repealed 1803, 2 Stat. 248, C. 6. Act of 1841, 5 Stat. 440, C. 9. Repealed 1843, 5 Stat. 614, C. 842. Act 1867, 14 Stat. 517,

C. 176. Repealed 1878, 20 Stat. 99, C. 160.

³ *Hanover National Bank v. Moyses*, 186 U. S. 181.

⁴ *Hanover National Bank v. Moyses*, 186 U. S. 181.

¹ *Brown v. Smart*, 145 U. S. 454; *Denny v. Bennett*, 128 U. S. 489; *Cook v. Moffat*, 5 How. (U. S.) 295; *Baldwin v. Hale*, 1 Wall. (U. S.)

Hence, a creditor domiciled outside of the state which grants such discharge, who does not participate in the proceedings in bankruptcy is in no way affected by such discharge.² This rule applies even to contracts made in the state where the discharge was given and to be performed there, as long as the creditor is actually domiciled in another state.³ It applies to a foreign corporation doing business in the state which grants the discharge, even if such corporation has appointed an agent in such state on whom service can be made.⁴ It applies even where a non-resident individual has been doing business in the state under a name that suggests a domestic corporation.⁵ It applies to a partnership, one member of which is a non-resident.⁶ It applies to a contract entered into with a non-resident through an agent who is a resident.⁷ It applies to a debt due to a resident which is in good faith transferred to a non-resident before insolvency proceedings are begun.⁸ Thus a citizen of Massachusetts made a note payable to himself at Boston and then indorsed it to a citizen of Vermont. Such note was not

223; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Bean v. Loryea*, 81 Cal. 151; 22 Pac. 513; *Hawley v. Hunt*, 27 Ia. 303; 1 Am. Rep. 273; *Pratt v. Chase*, 44 N. Y. 597; 4 Am. Rep. 718; *Roberts v. Atherton*, 60 Vt. 563; 6 Am. St. Rep. 133; 15 Atl. 159.

² *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Gilman v. Lockwood*, 4 Wall. (U. S.) 409; *Denny v. Bennett*, 128 U. S. 489; *Security, etc., Co. v. Rogers*, 6 Ida. 526; 57 Pac. 316; *Swift v. Winchester*, 96 Me. 480; 90 Am. St. Rep. 414; 52 Atl. 1017; *Haman v. Brennan*, 170 Mass. 405; 49 N. E. 655; *Pattee v. Paige*, 163 Mass. 352; 47 Am. St. Rep. 459; 28 L. R. A. 451; 40 N. E. 108; *Wilson v. Keels*, 54 S. C. 545; 71 Am. St. Rep. 816; 32 S. E. 702.

³ *Baldwin v. Hale*, 1 Wall. (U.

S.) 223; *Easterly v. Goodwin*, 35 Conn. 279; 95 Am. Dec. 237; *Pullen v. Hillman*, 84 Me. 129; 30 Am. St. Rep. 340; 24 Atl. 795; *Tebbetts v. Pickering*, 5 Cush. (Mass.) 83; 51 Am. Dec. 48; *Bedell v. Scruton*, 54 Vt. 493.

⁴ *Hammond, etc., Co. v. Best*, 91 Me. 431; 42 L. R. A. 528; 40 Atl. 338; *Bergner, etc., Co. v. Dreyfus*, 172 Mass. 154; 70 Am. St. Rep. 251; 51 N. E. 531.

⁵ *Swift v. Winchester*, 96 Me. 480; 90 Am. St. Rep. 414; 52 Atl. 1017. (Swift did business in Maine under the name of the Bangor Beef Co.)

⁶ *Chase v. Henry*, 166 Mass. 577; 55 Am. St. Rep. 423; 44 N. E. 988.

⁷ *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11; 30 N. E. 176.

⁸ *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Felch v. Bugbee*, 48 Me. 9; 77 Am. Dec. 203.

barred by a discharge granted in Massachusetts.⁹ A claim assigned by a non-resident to a resident of the state in which insolvency proceedings are instituted is barred by such discharge,¹⁰ even if such assignment is merely to facilitate collection.¹¹ If a discharge granted by a state court of insolvency, is valid when granted, it may be interposed as a defense to an action in another state upon the same debt. Thus a discharge granted in one state and barring debts due to another citizen of the same state may be interposed as a defense in a subsequent action in another state.¹² A non-resident creditor may, however, take part in the insolvency proceedings, and thereby so submit himself to the jurisdiction of the court of the other state that a discharge will be binding upon him.¹³ He may take part in the proceedings so as to have this result by proving his claim,¹⁴ or by accepting a dividend.¹⁵ (2) Discharges under state bankrupt acts cannot affect debts contracted before the passage of the state act,¹⁶ even if the state act specifically provides for such discharge, since no state can pass any law impairing the obligation of contracts. (3) State bankrupt and insolvent laws are suspended by the passage of a Federal bankrupt act.¹⁷ Proceedings under a state law after the passage of

⁹ *Baldwin v. Hale*, 1 Wall. (U. S.) 223.

¹⁰ *Wheelock v. Leonard*, 20 Pa. St. 440.

¹¹ Where the claim is reduced to judgment in such state by such assignee in his own name. *French v. Robinson*, 86 Me. 142; 41 Am. St. Rep. 533; 29 Atl. 960.

¹² Discharge in Maryland: suit in Ohio. *Smith v. Parsons*, 1 Ohio 236; 13 Am. Dec. 608. Discharge in New York: suit in Ohio. *Bank v. Card*, 7 Ohio, Part II., 170.

¹³ *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Lowenberg v. Levine*, 93 Cal. 215; 16 L. R. A. 159; 28 Pac. 941; *Murray v. Roberts*, 150 Mass. 353; 15 Am. St. Rep. 209; 6 L. R. A. 346; 23 N. E. 208.

¹⁴ *Clay v. Smith*, 3 Pet. (U. S.) 411.

¹⁵ *Clay v. Smith*, 3 Pet. (U. S.) 411; *Murray v. Roberts*, 150 Mass. 353; 15 Am. St. Rep. 209; 6 L. R. A. 346; 23 N. E. 208. (Writ of error dismissed in 150 U. S. 361, on the ground that no Federal question was involved.)

¹⁶ *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Mechanics' Bank v. Smith*, 6 Wheat. (U. S.) 131; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Schwartz v. Drinkwater*, 70 Me. 409; *Mather v. Bush*, 16 Johns. (N. Y.) 233; 8 Am. Dec. 313; *Elton v. O'Connor*, 6 N. D. 1; 33 L. R. A. 524; 68 N. W. 84.

¹⁷ *Tua v. Carriere*, 117 U. S. 201; *Sturges v. Crowninshield*, 4 Wheat.

the United States act of 1898 are unauthorized.¹⁸ An assignment for the benefit of creditors, made after the passage of a Federal bankrupt act, is valid except on attack by the trustee in bankruptcy;¹⁹ and a creditor who has assented to the assignment cannot attack its validity.²⁰ The Act of 1898 provides "Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it."²¹

§1546. Statutory provisions concerning discharge.

The effect of a discharge in bankruptcy upon pre-existing contract liabilities depends of course upon the provisions which the legislature has seen fit to enact. The bankrupt law of 1898 provides in Sec. 17: "Debts not Affected by a Discharge. —a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The amendment of February 5, 1903, provides in Sec. 17:

(U. S.) 122; *In re Curtis*, 91 Fed. 737; *In re Rouse*, 91 Fed. 96; *In re Bruss Ritter Co.*, 90 Fed. 651; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178; 70 Am. St. Rep. 258; 51 N. E. 529; *Armour Packing Co. v. Brown*, 76 Minn. 465; 79 N. W. 522; *In re Reynolds*, 8 R. I. 485; 5 Am. Rep. 615.

¹⁸ *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178; 70 Am. St. Rep. 258; 51 N. E. 529.

¹⁹ *Boese v. King*, 108 U. S. 379;

Armour Packing Co. v. Brown, 76 Minn. 465; 79 N. W. 522.

²⁰ *In re Romanow*, 92 Fed. 510.

²¹ Sec. 70, "The time when this act shall go into effect"—b. *Harbaugh v. Costello*, 184 Ill. 110; 75 Am. St. Rep. 147; 56 N. E. 363; affirming. 83 Ill. App. 29; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178; 70 Am. St. Rep. 259; 51 N. E. 529; *E. C. Westcott Co. v. Berry*, 69 N. E. 505; 45 Atl. 352.

“Debts not Affected by a Discharge.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.”

The provisions of state laws on the subject are diverse. The effect of a discharge granted thereunder can be determined only by an examination of the statute under which it is granted.

II. WHAT ARE PROVABLE DEBTS.

§1547. Provable debts.

To be affected by a discharge in bankruptcy, the debt in question must be: (1) a debt provable in bankruptcy; and (2) not within any of the statutory exceptions. It is, therefore, necessary to determine what is a debt provable in bankruptcy, and then what debts fall within the statutory exceptions. In determining whether a debt is provable in bankruptcy it is necessary to consider (1) when did the debt come into existence; and (2) what is the nature of the debt.

§1548. Claims in nature of tort.

A claim in tort or in the nature of tort, which has not been reduced to judgment and is not liquidated is not a provable debt and is therefore not barred by a discharge in bankruptcy.¹

¹ Hapgood v. Blood, 11 Gray (Mass.) 400; Hun v. Cary, 82 N. Y. 65; 37 Am. Rep. 546.

An action in trover for the recovery of personalty is not barred by a discharge in bankruptcy though a money verdict may be taken and in the particular case, is taken.² So a claim for double rent for withholding rented premises unlawfully from a landlord is not a debt *ex contractu* and is therefore not barred by a discharge in bankruptcy.³ So the statutory liability of a director of a corporation imposed for failure to file the report required by statute is in the nature of tort and is not discharged by bankruptcy.⁴ Rendition of judgment is necessary to liquidate a claim in tort so as to make it a provable debt. Even if a claim in tort has been the basis of a verdict, but judgment has not been rendered, it is not a provable debt.⁵ Further discussion of this topic is unnecessary, as it concerns the law of tort and not the law of contract.

§1549. When debt must exist.

To constitute a provable debt, the debt in question must have been in existence when the proceedings in bankruptcy were instituted. A debt which comes into existence after a petition in bankruptcy is filed is not affected by such proceedings in bankruptcy.¹ A discharge in bankruptcy does not protect a creditor against a judgment for costs rendered against the bankrupt after the adjudication in bankruptcy, even if such judgment is rendered in an action begun before such adjudication.² A note given after proceedings in bankruptcy have been begun is treated as a debt then created, even if given for an antecedent debt which existed when proceedings in bankruptcy were begun. Such a note is therefore not barred by a discharge in bankruptcy.³ Such a note is analogous to a new promise. If a judgment is rendered while bankruptcy proceedings are

² *Berry v. Jackson*, 115 Ga. 196; 90 Am. St. Rep. 102; 41 S. E. 698.

³ *Hamilton v. McCroskey*, 112 Ga. 651; 37 S. E. 859.

⁴ *Old Colony, etc., Co. v. Parker, etc., Co.*, 183 Mass. 557; 67 N. E. 870.

⁵ *Hodges v. Chace*, 2 Wend. (N. Y.) 248.

¹ *In re Burka*, 104 Fed. 326; *Hornthal v. McRae*, 67 N. C. 21.

² *In re Marcus*, 105 Fed. 907; 45 C. C. A. 115; affirming, s. c., 104 Fed. 331.

³ *Lerow v. Wilmarth* 7 All. (Mass.) 463; 83 Am. Dec. 701.

pending, a discharge in bankruptcy subsequently rendered is a bar to the enforcement of such judgment.⁴ If a discharge is granted before judgment is rendered, the bankrupt should plead his discharge in bar; and his failure to plead it is a waiver of the defense.⁵ So if a discharge is granted before judgment is rendered, but the discharge is not entered until after judgment is rendered, such discharge takes effect from the time it is granted and not from the time it is entered. It is therefore not a bar to such judgment.⁶ If the bankrupt has entered into a covenant of warranty, the question of the effect of a discharge upon his liability under such covenant depends on when such covenant is broken. If the covenant is broken before proceedings in bankruptcy are instituted the covenantor's liability thereon is barred by such discharge.⁷ If the covenant is not broken until after such proceedings are instituted, the covenantor's liability is not barred by such discharge.⁸ Liability on a bond, breach of which did not occur until two months after the petition in bankruptcy is filed is not barred by a discharge in bankruptcy.⁹ A decree rendered against a stockholder based on his stock liability, in a suit to which he

⁴ *Boynton v. Ball*, 121 U. S. 457; reversing, 105 Ill. 627; *Tefft v. Knox*, 37 Kan. 37; 14 Pac. 441; *Pine Hill Coal Co. v. Harris*, 86 Ky. 421; 6 S. W. 24; *Huntington v. Saunders*, 166 Mass. 92; 43 N. E. 1035; *Whyte v. McGovern*, 51 N. J. L. 356; 17 Atl. 957; *Locheimer v. Stewart*, 91 Tenn. 385; 30 Am. St. Rep. 887; 19 S. W. 21; *Dick v. Powell*, 2 Swan (Tenn.) 632; *Blair v. Carter*, 78 Va. 621; *Zumbro v. Stump*, 38 W. Va. 325; 18 S. E. 443. *Contra*, under a state insolvent law, on the theory that the debt is merged in the judgment and hence is not provable, while the judgment is not provable because rendered after bankruptcy proceedings were instituted. *Emery, Appellant*, 89 Me. 544; 56 Am. St.

Rep. 440; 36 Atl. 992. See to the same effect as the last case cited. *Percy v. Foote*, 36 Conn. 102; *Bowen v. Eichel*, 91 Ind. 22; 46 Am. Rep. 574; *Wheeler, etc., Co. v. Taft*, 61 N. H. 1.

⁵ See §1565.

⁶ *Leisure v. Kneeland*, 2 Wash. 537; 26 Am. St. Rep. 888; 27 Pac. 176.

⁷ *Williams v. Harkins*, 55 Ga. 172; *Dow v. Davis*, 73 Me. 288.

⁸ *Bush v. Person*, 18 How. (U. S.) 82; *French v. Morse*, 2 Gray (Mass.) 111; *Magwire v. Riffin*, 44 Mo. 512; *Wright v. Gottschalk* (Tenn. Ch. App.), 43 L. R. A. 189; 48 S. W. 140.

⁹ *Goding v. Rosenthal*, 180 Mass. 43; 61 N. E. 222.

is not a party, makes his liability a provable debt; and such liability is barred by his discharge.¹⁰

§1550. Liability for contribution and exoneration.

If a bankrupt receives a discharge, this is not, as will be seen,¹ a bar which can be invoked by those who are liable with him, whether primarily, or secondarily. If such persons are compelled to pay such debt to the creditor, the question whether their claim against the bankrupt for contribution or exoneration is barred by such discharge is presented for adjudication. If the persons who are compelled to pay such debt are jointly liable with the bankrupt not as surety for him, but all as surety for a third person, his discharge is no bar to their claim for contribution for payments made by them after bankruptcy proceedings have been instituted according to the numerical weight of authority,² though some carefully considered cases have, with better reasoning, held that such claims are barred by such discharge.³ Where the bankrupt law provides a means for proving the joint claim against the bankrupt's estate no good reason appears why the liability of the maker to his co-obligors cannot be estimated and treated as a provable claim. If the bankrupt is primarily liable and those liable jointly with him are liable as sureties for him the weight of authority treats his discharge as barring the claims of his sureties for contribution arising out of payments upon such debt made by them after proceedings in bankruptcy were begun, if such claim on which the bankrupt is primarily liable was itself provable in bankruptcy.⁴ A minority of the states hold that the claim of the

¹⁰ *Dight v. Chapman*, — Or. —; *Eberhardt v. Wood*, 6 Lea (Tenn.) 75 Pac. 585. 467.

¹ See § 1563.

² *Brown v. J. & E. Stevens Co.*, 52 Conn. 110; *Dale v. Warren*, 32 Me. 94; 52 Am. Dec. 640; *Liddell v. Wiswell*, 59 Vt. 365; 8 Atl. 680; *Smith v. Hodson*, 50 Wis. 279; 6 N. W. 812.

³ *Tobias v. Rogers*, 13 N. Y. 59;

⁴ *Mace v. Wells*, 7 How. (U. S.) 272; reversing 17 Vt. 503; *Post v. Losey*, 111 Ind. 75; 60 Am. Rep. 677; 12 N. E. 121; *Columbia Falls Brick Co. v. Glidden*, 157 Mass. 175; 31 N. E. 801; *Hardy v. Carter*, 8 Humph. (Tenn.) 153.

surety is not barred.⁵ Of course if such claim was not provable in bankruptcy the liability of the bankrupt to his creditor is not barred, and hence his liability over to his surety for subsequent payments on such debt is not barred either.⁶

§1551. Continuing contracts.

A continuing contract is not affected by a discharge in bankruptcy as to amounts which fall due thereunder after bankruptcy proceedings are instituted unless there is some special provision therefor in the bankrupt statute.¹ Future rents have been held not to be affected by a discharge in bankruptcy.² Even under the United States act of 1898 it has been held that bankruptcy discharges a lease,³ even if under the state statute the landlord has a lien upon the tenant's property on the premises for rent to become due.⁴ Liability on a penal bond, conditioned on the payment to another for life, of certain rents and annuities has been held to be provable as a fixed liability against the estate of the bankrupt, as to installments in arrears, but not as to those to fall due thereafter.⁵

§1552. Contingent liabilities.

The question whether a contingent liability is barred by a discharge in bankruptcy depends on the question whether it is a provable debt. If the contingent debt is provable¹ it is barred by the discharge. The liability of a bankrupt as surety,

⁵ *Lewis v. Brown*, 41 Me. 448;
Paxson v. Haster, 11 N. J. L. 410.

⁶ *Dunn v. Sparks*, 7 Ind. 490; *Haliburton v. Carter*, 55 Mo. 435.

¹ *Bernhardt v. Curtis*, 109 La. 171; 94 Am. St. Rep. 445; 33 So. 125; *Robinson v. Peasant*, 53 N. Y. 419.

² *Bernhardt v. Curtis*, 109 La. 171; 94 Am. St. Rep. 445; 33 So. 125; *Rodick v. Bunker*, 84 Me. 441; 30 Am. St. Rep. 364; 24 Atl. 897; *Treadwell v. Marden*, 123 Mass. 390; 25 Am. Rep. 108.

³ *Bray v. Cobb*, 100 Fed. 270.

⁴ *In re Jefferson*, 93 Fed. 948.

⁵ *Cobb v. Overman*, 109 Fed. 65; 54 L. R. A. 369; 48 C. C. A. 223. (The amount of the claim was limited to the penalty of the bond, where the computed value of the expectancy exceeded that amount.)

¹ *Mooney v. Detrick*, 85 Cal. 549; 26 Pac. 280; *Rand v. King*, 156 Mass. 515; 31 N. E. 650; *Nesbit v. Greaves*, 6 W. & S. (Pa.) 120.

guarantor, indorser and the like, for another is provable, and is therefore barred by a discharge in bankruptcy if it existed when proceedings in bankruptcy were begun.² Under the bankrupt act of 1898 a means is provided for a party secondarily liable to prove the claim against the primary debtor, if the creditor does not prove it. The claim of a surety against his principal for a debt which the surety is obliged to pay after the discharge of his principal in bankruptcy, is therefore barred by such discharge.³ If the amount of a stockholder's liability to creditors of a corporation under a statute imposing such liability is fixed,⁴ as where the corporation has ceased to do business and the amount of its debts is fixed;⁵ or the corporation is avowedly insolvent, having made an assignment for the benefit of creditors,⁶ a discharge in bankruptcy granted to a stockholder is a bar which the stockholder may invoke as against the creditors of the corporation. In Massachusetts the liability of directors and stockholders for debts of the corporation is held not to be a debt provable when the petition in bankruptcy is filed, and hence not barred by such discharge.⁷

§1553. Liability to support wife and children.

The liability of one for the support of his wife and children is not a debt and is certainly not provable.¹ Accordingly, the

² *Reitz v. People*, 72 Ill. 435; *Begein v. Brehm*, 123 Ind. 160; 23 N. E. 496; *Bouie v. Prickett*, 7 Humph. (Tenn.) 169.

³ *Hayer v. Comstock*, 115 Ia. 187; 88 N. W. 351. (The note was here listed and proved in bankruptcy.)

⁴ *Carey v. Meyer*, 79 Fed. 926; *Irons v. Bank*, 27 Fed. 591; *Marr v. Bank*, 4 Lea (Tenn.) 578.

⁵ *Irons v. Bank*, 27 Fed. 591.

⁶ *Carey v. Mayer*, 79 Fed. 926. In this case A had subscribed to capital stock in a corporation and had not paid the corporation fully therefor. The corporation became insolvent and made an assignment for the

benefit of creditors. A then filed a petition in bankruptcy and obtained a discharge. Then a call was made for payment on stock. It was held that A's discharge in bankruptcy was a bar to liability for such stock.

⁷ *Old Colony, etc., Co. v. Adams Co.*, 183 Mass. 557; 67 N. E. 870; *First National Bank v. Mfg. Co.*, 127 Mass. 563.

¹ *Menzie v. Anderson*, 65 Ind. 239; *Romaine v. Chauncey*, 129 N. Y. 566; 26 Am. St. Rep. 544; 14 L. R. A. 712; 29 N. E. 826. "Alimony does not arise from any business transaction, but from the relation

weight of authority including the Supreme Court of the United States,² has held that the liability of one to support his wife, even if such liability has resulted in a decree of alimony,³ are not barred by a discharge in bankruptcy. The fact that the decree of alimony is for a lump sum payable in installments,⁴ or that the discharge is sought as against over-due installments,⁵ does not alter the rule. A contract by A to pay a certain sum annually to his divorced wife as long as she remains unmarried, and to support their two children till they came of age is not barred by A's discharge in bankruptcy.⁶ The value of the wife's interest under the contract depending, as it does, on the double contingency of remarriage or death is impossible to ascertain,⁷ and his liability to support his children being a "contract to do that which the law obliged him to do" could not be barred by such discharge. So a discharge does not bar

of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction." *Audubon v. Shufeldt*, 181 U. S. 575, 577.

² *Audubon v. Shufeldt*, 181 U. S. 575.

³ *In re Hawkins* (1894), 1 Q. B. 25; *Kerr v. Kerr* (1897), 2 Q. B. 439; *Linton v. Linton*, L. R. 15 Q. B. Div. 239; *Turner v. Turner*, 108 Fed. 785; *In re Nowell*, 99 Fed. 931; *In re Anderson*, 97 Fed. 321; *In re Shepard*, 97 Fed. 187; *Welty v. Welty*, 195 Ill. 335; 88 Am. St. Rep. 208; 63 N. E. 161; *Deen v. Bloomer*, 191 Ill. 416; 61 N. E. 131; *Barclay v. Barclay*, 184 Ill. 375; 51 L. R. A. 351; 56 N. E. 636; *Lemert v. Lemert*, 25 Ohio C. C. 253; *Noyes v. Hubbard*, 64 Vt. 302; 33 Am. St. Rep. 928; 15 L. R. A. 394; 23 Atl. 727. *Contra*, *In re Houston*, 94 Fed. 119; *In re Van Orden*, 96 Fed. 86;

In re Challoner, 98 Fed. 82 (over-due installments under an Illinois decree); *Fite v. Fite*, 110 Ky. 197; 53 L. R. A. 265; 61 S. W. 26 (where the state law makes it an ordinary debt); *Arrington v. Arrington*, 131 N. C. 143; 92 Am. St. Rep. 769; 42 S. E. 554. (This last case was so decided because the court had already decided that this decree was a final judgment, *Arrington v. Arrington*, 127 N. C. 190; 80 Am. St. Rep. 791; 52 L. R. A. 201; 37 S. E. 212, and they held themselves bound by such decision to treat a subsequent discharge in bankruptcy as barring such decree. The original decree of alimony was rendered in Illinois.)

⁴ *Welty v. Welty*, 195 Ill. 335; 88 Am. St. Rep. 208; 63 N. E. 161.

⁵ *Audubon v. Shufeldt*, 181 U. S. 575; *In re Anderson*, 97 Fed. 321.

⁶ *Dunbar v. Dunbar*, 190 U. S. 340; affirming 180 Mass. 170; 94 Am. St. Rep. 623; 62 N. E. 248.

⁷ See also *Mudge v. Rowan*, L. R. 3 Ex. 85.

an order of court requiring payment for the support of minor children;⁸ nor a judgment in bastardy requiring the putative father to pay a certain monthly sum to the mother of the child for its support.⁹ However, a final judgment for the total amount due under a prior order directing a putative father to make certainly monthly payments to his bastard child has been held to be barred by his discharge in bankruptcy.¹⁰ Liability of a father to reimburse a wife for money expended by her in support of their minor child has been held to be an ordinary debt and hence barred by discharge.¹¹

III. DEBTS EXCEPTED FROM OPERATION OF DISCHARGE.

§1554. Judgments for wilful and malicious injuries to person or property.

Certain classes of debts are specifically excepted by the bankrupt acts from the operation of a discharge in bankruptcy. These classes must, therefore, be considered separately. The bankrupt act of 1898 excepts from the operation of the discharge judgments in actions for wilful and malicious injury to the person or property of another. This provision prevents a discharge from barring a judgment for libel,¹ or slander,² or for malicious prosecution,³ or for criminal conversation;⁴ for alienating the affections of the husband⁵ or wife⁶ of the judgment creditor; for seduction of the judgment creditor's

⁸ *In re Hubbard*, 98 Fed. 710; *Rush v. Flood*, 105 Ill. App. 182.

⁹ *In re Baker*, 96 Fed. 954; *Hawes v. Cooksey*, 13 Ohio 242.

¹⁰ *McKittrick v. Cahoon*, 89 Minn. 383; 62 L. R. A. 757; 95 N. W. 223.

¹¹ *Rush v. Flood*, 105 Ill. App. 182.

¹ *McDonald v. Brown*, 23 R. I. 546; 91 Am. St. Rep. 659; 58 L. R. A. 768; 51 Atl. 213.

² *Sanderson v. Hunt*, — Ky. —; 76 S. W. 179.

³ *Mason v. Perkins*, — Mo. —; 79 S. W. 683.

⁴ *Tinker v. Colwell*, 193 U. S. 473; affirming *Colwell v. Tinker*, 169 N. Y. 531; 98 Am. St. Rep. 586; 58 L. R. A. 765; 62 N. E. 668; *In re Freche*, 109 Fed. 620; *Colwell v. Tinker*, 169 N. Y. 531; 98 Am. St. Rep. 586; 58 L. R. A. 765; 62 N. E. 668. Compare *In re Tinker*, 99 Fed. 79.

⁵ *Leicester v. Hoadley*, 66 Kan. 172; 71 Pac. 318.

⁶ *Exline v. Sargent*, 23 Ohio C. C. 180.

minor daughter;⁷ or for the seduction of the judgment creditor herself, recovered under a state statute giving an action therefor.⁸

§1555. Judgments for fraud.

The bankrupt act of 1898 excepts from the operation of the discharge judgments in actions for fraud or obtaining property by false pretenses or false representations.¹ To constitute a judgment for fraud within the meaning of the bankrupt act of 1898, the fraud must have been the very basis of the action, and not merely a fact collateral thereto. A judgment in an action on a simple contract debt, and to set aside a transfer of property as in fraud of the debtor's creditors, is not a judgment for fraud within the meaning of the bankrupt act.² If an action has been brought for fraud, and judgment recovered thereon, the judgment is not such a merger of the original cause of action as to prevent this section of the bankrupt act from applying and to prevent such judgment from being barred by a discharge in bankruptcy.³ What is an action for fraud in such sense that a judgment rendered therein is not barred by a discharge in bankruptcy is a question on which there is some divergence of judicial opinion. If an action is brought against the debtor for deceit, and judgment recovered against him, such judgment is evidently not discharged in bankruptcy.⁴ If, on a similar transaction, the creditor waives the fraud, and sues to enforce the contract, this waiver of the fraud has been held binding upon the creditor for purposes of a discharge in bankruptcy, and he cannot, after obtaining such judgment, claim, for the purpose of avoiding the effect of a discharge, that the cause of action was based on fraud.⁵ A judgment rendered on the common counts in an action the record of which does not contain

⁷ *In re Freche*, 109 Fed. 620.

⁸ *In re Maples*, 105 Fed. 919.

¹ *Forsyth v. Vehmeyer*, 177 U. S. 177; affirming s. c., 176 Ill. 359; 52 N. E. 55.

² *In re Blumberg*, 94 Fed. 476.

³ *Packer v. Whittier*, 91 Fed. 511;

33 C. C. A. 658; *Bennett v. Justices*, 166 Mass. 126; 44 N. E. 121.

⁴ *In re Cole*, 106 Fed. 837; *Turner v. Atwood*, 124 Mass. 411.

⁵ *Hargadine - McKittrick Dry Goods Co. v. Hudson*, 122 Fed. 232; affirming 111 Fed. 361.

allegations of fraud is not a judgment in an action for fraud.⁶ If the debtor obtains a loan of money from the bank by means of false representations as to the amount of property owned by him, and gives his promissory note for the amount of the loan, a judgment taken upon such note is not a judgment in an action for fraud, within the meaning of this section of the statute.⁷ A judgment in an action for goods sold to a bankrupt, induced by his false representations and fraud, has been held not to be a judgment in an action for fraud or false pretenses,⁸ even if in that action a writ of attachment issued, one of the grounds of which was that the debt sued for was fraudulently contracted.⁹ On the other hand, a judgment for goods sold, the sale of which it is alleged and found by the court was procured by false representations, is a debt which is not barred by the debtor's discharge in bankruptcy.¹⁰ A judgment rendered in an action brought in part for money had and received, and also in part on an indebtedness created by the fraud and embezzlement of the debtor as trustee, where a general verdict is rendered without showing that it is in any part made up of the latter indebtedness, is not a debt created by fraud, and is barred by the discharge in bankruptcy.¹¹ A judgment in an action of trover and conversion is not a judgment for fraud.¹²

§1556. Debt created by fraud.

The act of 1898 made provision in section 17, clause 2, excepting "judgments in action for fraud" from the operation of a discharge; and in clause 4, excepting debts which were created by the bankrupt's "fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." Accordingly if a debt has been created by fraud

⁶ Barnes Mfg. Co. v. Norden, 67 N. J. L. 493; 51 Atl. 454.

⁷ *In re Rhutassel*, 96 Fed. 597.

⁸ *Morse v. Kaufman*, 100 Va. 218; 40 S. E. 916.

⁹ *Goodman v. Herman*, 172 Mo. 344; 60 L. R. A. 885; 72 S. W. 546.

¹⁰ *In re Lewensohn*, 104 Fed. 1006; 44 C. C. A. 309; affirming 99 Fed. 73.

¹¹ *Cooke v. Plaisted*, 181 Mass. 82; 62 N. E. 1054.

¹² *Crosby v. Miller*, 25 R. I. 172; 55 Atl. 328.

but has not been reduced to judgment and the fraud was not committed by one acting in a fiduciary capacity, there is a divergence of judicial opinion as to whether such debt is barred by discharge. By one view a claim for fraud is held to be included under the head of "judgments in actions for fraud," even if not reduced to judgment, and hence by clause 2 of section 17 of the bankrupt act of 1898, is not affected by the discharge.¹ By another view, such a debt is not affected by a discharge because of clause 4 of section 17. This conclusion is reached by holding that the clause "while acting as an officer or in any fiduciary capacity" does not refer to debts "created by his fraud," but only to the classes of debts subsequently enumerated.² A third view is that such a debt is not exempt from the operation of a discharge. This conclusion is reached on the ground that such a claim is not a "judgment" under clause 2; and if not incurred in a fiduciary capacity is not included under clause 4.³ The question has in part been settled by the amendment of 1903 which substitutes the word "liabilities" for "judgments" in section 2. It is still an open question as to prior discharges; and the meaning of section 4 is still open to question. Provisions similar to those of the amendment of 1903 are found in earlier bankrupt acts. The word "judgment" is not employed; some expression like "claim" "debt" or "liability" being found in its place.⁴ Proving a judgment rendered in an action for fraud or a debt created by fraud,⁵ and accepting a dividend thereon,⁶ does not make the debt one which is barred by a discharge in bankruptcy. An averment that the defendant 'embezzled' plaintiff's money has been held to impart a fiduciary relation; and

¹ *In re* Wallock, 120 Fed. 516.

² *In re* Butts, 120 Fed. 966; Crawford v. Burke, 201 Ill. 581; 66 N. E. 833; affirming 102 Ill. App. 566.

³ J. C. Smith, etc., Co. v. Lambert, 69 N. J. L. 487; 55 Atl. 88; Crosby v. Miller, 25 R. I. 172; 55 Atl. 328.

⁴ Warner v. Cronkhite, 6 Biss. (U. S. C. C.) 453; Taylor v. Farmer, 81

Ky. 458; Wilson v. Hawley, 158 Mass. 250; 33 N. E. 522; *In re* Kaeppler, 7 N. D. 435; 75 N. W. 789; Hughes v. Oliver, 8 Pa. St. 426; Stokes v. Mason, 10 R. I. 261.

⁵ Strang v. Bradner, 114 U. S. 555; Forsyth v. Vehmeyer, 176 Ill. 359; 52 N. E. 55.

⁶ Forsyth v. Vehmeyer, 176 Ill. 359; 52 N. E. 55.

hence the defense of a discharge in bankruptcy is an insufficient answer to such a petition.⁷

§1557. General nature of fraud.

The nature of fraud whether the basis of a judgment, as under the act of 1898, or whether a claim not in judgment as under other bankrupt acts, must next be considered. The term "fraud" means positive fraud, and implies some degree of moral turpitude.¹ To fall within this clause of the statute the debt must have been created by fraud. Fraudulent conduct after the debt has been created does not bring it within this class.² Hence a debt which arises from an overpayment by a mistake which the party receiving it declines to refund, is not a debt created by fraud.³ A judgment rendered in favor of a father against one who has seduced the former's daughter not under promise of marriage is not a "debt created by fraud."⁴ "Fraud" means fraud whereby the bankrupt deceives his creditor and induces him to extend credit. It has no reference to fraud which the bankrupt and his creditor have conspired to practice on a third person. Hence if A buys on credit from B under an agreement to defraud B's creditors, A's debt to B is not incurred through "fraud"; and hence is barred by A's discharge in bankruptcy.⁵ Actual fraud is included within the bankrupt acts. A debt incurred in the purchase of goods by

⁷ Watertown Carriage Co. v. Hall, 176 N. Y. 313; 68 N. E. 629.

¹ Noble v. Hammond, 129 U. S. 65; reversing 57 Vt. 193; Hennequin v. Clews, 111 U. S. 676; affirming 77 N. Y. 427; 33 Am. Rep. 641. The term fraud means "positive fraud or fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law which may exist without the imputation of bad faith or immorality." Ames v. Moir, 138 U. S. 306, 311; affirming 130 Ill. 582; 22 N. E. 535; and citing Neal v. Clark, 95 U.

S. 704; Wolf v. Stix, 99 U. S. 1; Hennequin v. Clews, 111 U. S. 676; Strang v. Bradner, 114 U. S. 555; Noble v. Hammond, 129 U. S. 65; Upshur v. Briscoe, 138 U. S. 365.

² Wolf v. Stix, 99 U. S. 1; Neal v. Clark, 95 U. S. 704; Western Union Cold Storage Co. v. Hurd, 116 Fed. 442; Brown v. Broach, 52 Miss. 536; Bank v. Crandall, 87 Mo. 208.

³ Western Union Cold Storage Co. v. Hurd, 116 Fed. 442.

⁴ Howland v. Carson, 28 O. S. 625.

⁵ Wolf v. Stix, 99 U. S. 1.

one who does not intend to pay for them, but to resell them and appropriate the proceeds,⁶ or by one who induces the sale on credit by false and fraudulent statements as to his own financial condition,⁷ or by false representations as to the condition of his business and the profits thereof⁸ is created by fraud. So is a loan, induced by fraudulently giving worthless bonds as security therefor.⁹ So is an accommodation note fraudulently procured by false representations that accommodation notes executed prior thereto had not been put into circulation.¹⁰ So is a note and mortgage which A induces X to execute to B, to obtain a loan from B to X, where A concealed from X the fact that A was indebted to B and that A had used the money derived from this loan in part to pay off his own debt to B, instead of using it to discharge a debt owing from X, as he promised to do.¹¹ Advances of money obtained by false and fraudulent representations that the debtor had a certain amount of wood cut and ready for shipment, and that he had contracted for the sale of it at a certain price, constitute a debt created by means of fraud involving moral turpitude and intentional wrong. Such debt is not barred by a discharge under the bankrupt act of 1867.¹²

§1558. Debts created in fiduciary capacity.

The Bankrupt Act of 1898 also excepts provable debts created by the fraud, embezzlement, misappropriation or defalcation of the debtor while acting as an officer or in any fiduciary capacity. Similar provisions are found in other bankrupt acts.¹

⁶ *Ames v. Moir*, 138 U. S. 306; affirming 130 Ill. 582; 22 N. E. 535.

⁷ *Broadnax v. Bradford*, 50 Ala. 270; *Turner v. Atwood*, 124 Mass. 411. (The action in which this question arose being "tort or contract.")

⁸ *Morse v. Hutchins*, 102 Mass. 439.

⁹ *Bank v. Crandall*, 87 Mo. 208. (The court points out that a differ-

ent result would have been reached had the fraudulent use of the bonds been made after the debt had been incurred.)

¹⁰ *Strang v. Bradner*, 114 U. S. 555; affirming 89 N. Y. 299.

¹¹ *Forbes v. Thomas*, 22 Neb. 541; 35 N. W. 411.

¹² *Forsyth v. Vehmeyer*, 177 U. S. 177; affirming *Forsyth v. Vehmeyer*, 176 Ill. 359; 52 N. E. 55.

¹ *Chapman v. Forsyth*, 2 How.

These words in the act of 1898 are the same as those in the acts of 1867 and 1841; and have the same meaning.² The question whether the words "while acting as an officer or in any fiduciary capacity" apply to all the classes of debts named in this clause or only to the latter classes is discussed elsewhere.³ A debt incurred by the defalcation of a public officer,⁴ or by the fraud of an officer of a corporation, as of a bank,⁵ is not barred by a discharge in bankruptcy. The term "fiduciary capacity" includes technical trusts, but not such trusts as the law implies from contract relations or from relations of general trust and confidence.⁶ Thus it includes technical trustees,⁷ receivers,⁸ executors and administrators⁹ and guardians¹⁰ as far as they are acting in a trust capacity. It does not include debts created by special contract between the parties in fiduciary capacities.¹¹ It does not include the liability of a surety on the bond of a trustee. If such surety obtains a discharge in bankruptcy this clause of the bankrupt act will not prevent such discharge from barring liability on such bond;¹² nor does it include the liability of one who has made default in his trust capacity and who has given his note to his sureties to reimburse them for sums advanced to cover such defalcation.¹³ Actual

(U. S.) 202; *Maybury v. Cook*, 121 Cal. 588; 54 Pac. 95; *Herrlich v. McDonald*, 80 Cal. 472; 22 Pac. 299; *Mock v. Howell*, 101 N. C. 443; 8 S. E. 167; *Pawlet v. Kelley*, 69 Vt. 398; 38 Atl. 92.

² *Crosby v. Miller*, 25 R. I. 172; 55 Atl. 328.

³ See § 1556.

⁴ *Madison v. Dunkle*, 114 Ind. 262; 16 N. E. 593; *Johnson v. Auditor*, 78 Ky. 282; *Grantham v. Clark*, 62 N. H. 426.

⁵ *Gerner v. Yates*, 61 Neb. 100; 84 N. W. 596. (An action for defrauding third persons by a false statement of the condition of the bank.)

⁶ *Johnson's Administrator v. Parmenter*, 74 Vt. 58; 52 Atl. 73.

⁷ *Donovan v. Haynie*, 67 Ala. 51;

Field v. Howry. — Mich. —; 94 N. W. 213; *Mock v. Howell*, 101 N. C. 443; 8 S. E. 167.

⁸ *Field v. Howry*. — Mich. —; 94 N. W. 213.

⁹ *Laramore v. McKinzie*, 60 Ga. 532; *Waller v. Edwards*, Litt. Sel. Cas. (Ky.) 348; *Johnson's Administrator v. Parmenter*, 74 Vt. 58; 52 Atl. 73.

¹⁰ *Simpson v. Simpson*, 80 N. C. 332.

¹¹ *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312.

¹² *Jones v. Knox*, 46 Ala. 53; 7 Am. Rep. 583; *Eberhardt v. Wood*, 6 Lea (Tenn.) 467; *Davis v. McCurdy*, 50 Wis. 569; 7 N. W. 665.

¹³ *Light v. Merriam*, 132 Mass. 283.

intent to deprive the beneficiary of the property or fund permanently is not necessary. Thus A, a trustee for the creditors of X and afterwards appointed as receiver of X's property, loaned the trust funds to a firm of which he was a member, taking their note therefor. He concealed the fact of this loan as long as he could. It was held that this debt was contracted in a fiduciary capacity, and was not barred by A's discharge in bankruptcy.¹⁴ This clause of the statute includes both active and passive wrong-doing. If the liability was incurred through neglect, as distinguished from active wrong-doing, such debt is not barred by a discharge.¹⁵ If a debt is created by fraud in a fiduciary capacity, the interest thereon is a mere incident of the debt and is not affected by such discharge.¹⁶ This clause of the bankrupt act does not include implied trusts; or actual trust and confidence existing between persons not in technical fiduciary relations. Accordingly, a buyer and seller of personal property are not thereby brought into fiduciary relations.¹⁷ Hence, a judgment against the vendee for the purchase price of the goods, even though the sale was induced by fraud,¹⁸ is not a debt created while acting in a fiduciary capacity. A shipped goods to B to be resold by him under a contract, on the back of which was a memorandum to the effect that B was to hold the goods and their proceeds "in trust and separate for the settlement of our account." This was held not to be sufficient to establish a technical trust; and therefore B's debt to A was barred by B's discharge in bankruptcy.¹⁹ So a debt due from an agent,²⁰ a commission merchant,²¹ or an attorney at

¹⁴ *Field v. Howry*, — Mich. —; 522; *Du Pont v. Beck*, 81 Ind. 271; 94 N. W. 213.

¹⁵ *Warren v. Robison*, 21 Utah 429; 61 Pac. 28.

¹⁶ *Johnson's Administrator v. Parmenter*, 74 Vt. 58; 52 Atl. 73.

¹⁷ *Goodman v. Herman*, 172 Mo. 344; 60 L. R. A. 885; 72 S. W. 546.

¹⁸ *Goodman v. Herman*, 172 Mo. 344; 60 L. R. A. 885; 72 S. W. 546.

¹⁹ *In re Butts*, 120 Fed. 966.

²⁰ *Bracken v. Milner*, 104 Fed.

522; *Du Pont v. Beck*, 81 Ind. 271; *Woodward v. Towne*, 127 Mass. 41; 34 Am. Rep. 337.

²¹ *Chapman v. Forsyth*, 2 How. (U. S.) 202; *In re Basch*, 97 Fed. 761; *Crosby v. Miller*, 25 R. I. 172; 55 Atl. 328. So under the act of 1867. *Hennequin v. Clews*, 111 U. S. 676. So under the act of 1841. *Austill v. Crawford*, 7 Ala. 335; *Commercial Bank v. Buckner*, 2 La. Ann. 1023; *Hayman v. Pond*, 7 Met. (Mass.) 328. See to the same ef-

law,²² to his principal arising out of the transaction of the agency, is not within this clause. The liability of a creditor to return collateral pledged to secure a debt, after payment of the same,²³ or to pay the surplus left out of the proceeds of such collateral after payment of the debt,²⁴ is not created in a fiduciary capacity. So where X pledged certain securities with A to secure X's debt to A, and A pledged them to B to secure A's debt to B, A's liability to X was not as trustee or in a fiduciary capacity.²⁵ If, however, an agent intrusted by his principal with money to be loaned on trust deed or mortgage, makes such loan, taking the title to himself as trustee, he thereby becomes a technical trustee, and his failure to pay over the proceeds arising on foreclosure of such trust deed creates a debt while he is acting in a fiduciary capacity.²⁶ The misappropriation of money by one partner while acting in the partnership business, does not, unless it is in violation of an express trust, create a debt owing by one acting in a fiduciary capacity.²⁷ A mere breach of contract is not fraud within the meaning of this section. Thus A sold wood to B, the title to remain in A until the wood was paid for. B sold the wood and appropriated the proceeds. His liability was held not to be created by fraud, embezzlement, or misappropriation while acting in a fiduciary capacity.²⁸ A borrowed money from B under a contract whereby A was to pay interest to X for life as long as A thought that X was conducting herself properly; but if not, the interest was to accumulate, to be paid over with the principal to the ultimate

fect *Woolsey v. Cade*, 54 Ala. 378; 25 Am. Rep. 711; *Hayman v. Pond*, 7 Met. (Mass.) 328; *Pankey v. Nolan*, 6 Humph. (Tenn.) 154. *Contra*, *Mayberry v. Cook*, 121 Cal. 588; 54 Pac. 95; *Lemcke v. Booth*, 47 Mo. 385; 4 Am. Rep. 326.

²² *Wolcott v. Hodge*, 15 Gray (Mass.) 547; 77 Am. Dec. 381. *Contra*, *Heffren v. Jayne*, 39 Ind. 463; 13 Am. Rep. 281.

²³ So in case of a broker. *Crosby v. Miller*, 25 R. I. 172; 55 Atl. 328.

²⁴ *Cronan v. Cotting*, 104 Mass. 245; 6 Am. Rep. 232.

²⁵ *Hennequin v. Clews*, 111 U. S. 676. For similar facts, see *Palmer v. Hussey*, 119 U. S. 96.

²⁶ *Bracken v. Milner*, 104 Fed. 522. So *Herrlich v. McDonald*, 80 Cal. 472; 22 Pac. 299.

²⁷ *Pierce v. Shippee*, 90 Ill. 371; *Gee v. Gee*, 84 Minn. 384; 87 N. W. 1116.

²⁸ *Bryant v. Kinyon*, 127 Mich. 152; 53 L. R. A. 801; 86 N. W. 531.

owner. This was held not to be a trust. Hence A's debt was barred by his discharge in bankruptcy.²⁹ Some authorities, however, construe the word "fraud" to include more than is included by the courts in the cases already discussed, and give a broader meaning to "fiduciary capacity." Thus misappropriating the proceeds of a note received for collection,³⁰ or money received to use in purchase of land for the party advancing the money,³¹ or to buy exchange,³² or money collected for laundry work by an agent working on a commission,³³ has been held to create debts which are not barred by a discharge in bankruptcy.

§1559. Debts omitted from schedule.

The earlier Federal bankrupt laws contained no provision concerning the omission of debts from the schedule. It was accordingly held that, under the clause of the statute providing that the discharge should bar all debts with certain exceptions, of which a debt omitted was not one, a discharge barred debts omitted from the schedule,¹ unless such omission was wilful and fraudulent.² The bankrupt act of 1898 excepts from the operation of the discharge debts which "have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." Accordingly a discharge does not bar a debt omitted from the schedule where the omitted creditor has no notice or knowledge of the bankruptcy proceedings in time to prove his claim.³ If

²⁹ *Upshur v. Briscoe*, 138 U. S. 365; affirming 37 La. Ann. 148 and 154; which revoked 37 La. Ann. 138.

³⁰ *Fulton v. Hammond*, 11 Fed. 291.

³¹ *Matteson v. Kellogg*, 15 Ill. 547.

³² *Herman v. Lynch*, 26 Kan. 435; 40 Am. Rep. 320.

³³ *Shipley v. Platts*, — S. D. —; 97 N. W. 1.

¹ *Fox v. Paine*, 10 Ala. 523; *Hoffman v. Haight*, 3 Mack. (D. C.) 21; *Graves v. Wright*, 53 Mich. 425; 19 N. W. 129; *Mitchell v. Singletary*, 19 Ohio 291; *Eberhardt v. Wood*, 6 Lea (Tenn.) 467; *Thomas v. Jones*, 39 Wis. 124.

² *Shepard v. Abbott*, 137 Mass. 224; *Thomas v. Jones*, 39 Wis. 124.

³ *In re Monroe*, 114 Fed. 398; *Hughes v. Clark*, 109 Ill. App. 107.

the bankrupt knows that a note has been discounted at a certain bank, and schedules such note in the name of the original payee and the bank has no notice or actual knowledge of the proceedings in bankruptcy such note is not barred by such discharge.⁴ The fact that the debt was omitted in good faith does not bring it within the operation of the discharge.⁵ If the creditor has actual knowledge of the proceedings in bankruptcy, his claim is barred by discharge even if omitted from the schedule.⁶ So a note is barred by discharge, which is scheduled by the debtor as being held by the original payee, although he knows it has been transferred if the transferee has actual knowledge of the proceedings in bankruptcy.⁷ If the debt is not listed in the schedule it is for the debtor to show affirmatively that the creditor had actual notice of the bankruptcy proceedings, to make the discharge operative as to such debt.⁸

§1560. Debts due to United States and state.

Under the bankrupt act of 1867, a discharge barred "all debts," with certain exceptions. It was held that this statute did not include debts due to the United States, even if such debts were not expressly excepted from the operation of such discharge.¹ It has generally been held that debts due to a state were not barred by a discharge.² The present bankrupt act expressly excepts debts "due as a tax levied by the United States, the state, county, district, or municipality" in which the debtor resides. It does not provide for other debts due to the United States or a state.

⁴ *Columbia Bank v. Birkett*, 174 N. Y. 112; 66 N. E. 652.

⁵ *Santa Rosa Bank v. White*, 139 Cal. 703; 73 Pac. 577.

⁶ *Zimmerman v. Ketchum*, 66 Kan. 98; 71 Pac. 264; *Jones v. Walter*, — Ky. —; 74 S. W. 249; *Knapp v. Harold*, 25 Ohio C. C. 213.

⁷ *Fider v. Mannheim*, 78 Minn. 309; 81 N. W. 2.

⁸ *Wineman v. Fisher*, — Mich. —; 98 N. W. 404.

¹ *United States v. Herron*, 20 Wall. (U. S.) 251. To the same effect, see *United States v. Wilson*, 8 Wheat. (U. S.) 253; *Smith v. Hodson*, 50 Wis. 279; 6 N. W. 812.

² *State v. Shelton*, 47 Conn. 400; *Johnson v. Auditor*, 78 Ky. 282; *Saunders v. Commonwealth*, 10 Gratt. (Va.) 494. *Contra*, *State v. Walsh*, 2 Gill & J. (Md.) 406.

IV. EFFECT OF DISCHARGE.

§1561. General effect of discharge.

The effect of a discharge in bankruptcy is that the bankrupt may, if he wishes, and if he pleads his discharge properly, use such discharge as a defense in an action based on a debt which was provable in bankruptcy and not within one of the exceptions to the bankrupt act. The discharge does not extinguish the debt. It has legal effect enough after the discharge to serve as the consideration for a new promise.¹ It can be used as a set-off according to some authorities,² though not according to others.³ The validity and effect of a discharge depends on the provisions of the law under which it was given and not on the provisions of any former law. The fact that certain debts existed under the bankrupt act of 1867 and could not be barred by a discharge obtained thereunder, and were kept alive by subsequent judgment, does not prevent them from being barred by a discharge obtained under the Bankrupt Act of 1898, if by the terms of such act they would be barred.⁴ A discharge was refused to a debtor in a state insolvent court. The cause of such refusal did not appear on the record, and it might have been, by virtue of a provision in the state statute controlling such proceedings, because the debtor's assets did not make more than fifty per cent of the proved claims, and a majority of his creditors in number and value would not consent to his discharge. Such refusal was held not to be such an adjudication as to prevent a discharge thereafter given him by a Federal court of bankruptcy from barring debts owing by him when such discharge was refused by the state court.⁵ Whether the discharge bars the debt in question must be determined in the first instance by the court in which an action on the debt is pending. The question whether a debt is contracted by fraud may be passed upon by a state court whenever such question

¹ See §§ 320, 1566.

46 C. C. A. 77; affirming 102 Fed.

² *Wilson v. Kelly*, 16 S. C. 216.

753.

³ *Francis v. Dodsworth*, 4 C. B. 202.⁵ *Dean v. Justice, etc.*, 173 Mass. 453; 53 N. E. 893.⁴ *In re Herrman*, 106 Fed. 987;

comes before it, but its action is not necessarily conclusive upon the federal court. Under a petition to the court of bankruptcy for an injunction against issuing or serving execution on a judgment of a state court, the adjudication of the state court that such debt was created by the bankrupt's fraud was not conclusive on the bankrupt court.⁶

§1562. Discharge as affecting liens.

Discharge in bankruptcy is merely a bar to an action upon the debts of the bankrupt affected thereby. It does not amount to a discharge on the debt itself. Accordingly, if a creditor has obtained a valid lien,¹ as by attachment,² or by garnishment,³ or by judgment⁴ or by levy,⁵ or by mechanic's lien,⁶ such lien is in no way affected by a subsequent discharge of the debtor in bankruptcy. So a discharge in bankruptcy does not prevent either a creditor,⁷ or the trustee in bankruptcy,⁸ from setting aside conveyances of property by the debtor in fraud of his creditors. So a discharge in bankruptcy does not avoid an assignment of future wages to secure one of the debts thus barred.⁹ In many of the cases the lien was created more than four months before the institution of bankruptcy proceedings.¹⁰

⁶ Knott v. Putnam, 107 Fed. 907.

¹ Philmon v. Marshall, 116 Ga. 811; 43 S. E. 48; McCall v. Herring, 116 Ga. 235; 42 S. E. 468; Evans v. Rounsaville, 115 Ga. 684; 42 S. E. 100; Dozier v. McWhorter, 113 Ga. 584; 39 S. E. 106; Paxton v. Scott, — Neb. —; 92 N. W. 611; Bank of Commerce v. Elliott, 109 Wis. 648; 85 N. W. 417.

² *In re* Blumberg, 94 Fed. 476; Wakeman v. Throckmorton, 74 Conn. 616; 51 Atl. 554; Stickney, etc., Co. v. Goodwin, 95 Me. 246; 85 Am. St. Rep. 408; 49 Atl. 1039; Rochester Lumber Co. v. Locke, 72 N. H. 22; 54 Atl. 705; Powers Dry Goods Co. v. Nelson, 10 N. D. 580; 58 L. R. A. 770; 88 N. W. 703. Ap-

parently *contra*, Wood v. Carr, — Ky. —; 73 S. W. 762.

³ Marx v. Hart, 166 Mo. 503; 89 Am. St. Rep. 715; 66 S. W. 260.

⁴ Dozier v. McWhorter, 113 Ga. 584; 39 S. E. 106.

⁵ Frazee v. Nelson, 179 Mass. 456; 88 Am. St. Rep. 391; 61 N. E. 40; Pinkhard v. Willis, 24 Tex. Civ. App. 69; 57 S. W. 891.

⁶ Seibel v. Simeon, 62 Mo. 255.

⁷ Johnson v. Grocery Co., 112 Ga. 449; 37 S. E. 766; Evans v. Staalle, 88 Minn. 253; 92 N. W. 951.

⁸ *In re* Pierce, 103 Fed. 64.

⁹ Mallin v. Wenham, 209 Ill. 252; 70 N. E. 564; affirming 103 Ill. App. 609.

¹⁰ *In re* Blumberg, 94 Fed. 476;

However, the provision of the bankrupt act which declares levies made within four months of the institution of bankruptcy proceedings to be void, means merely that the trustee may, by taking proper steps, have such levy declared void. If the trustee does not attack such levy, a sale thereunder is valid as against the debtor.¹¹ The same principle applies to attachments which the trustees does not attack.¹² Any preference obtained within the four months, as by levy,¹³ may be set aside on direct proceedings by the trustee. If, however, no lien exists a debt is barred, even though no exemptions could have been had against a judgment rendered thereon. Thus a debt for the purchase price of a chattel is barred by bankruptcy even though such property could not have been held as exempt against such debt.¹⁴

§1563. Effect on liability of co-debtor.

The bankrupt act of 1898 provides: "The liability of a person who is co-debtor with, or guarantor or in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt."¹ This section is not affected by the amendment of 1903. Accordingly a discharge does not affect the liability of other parties.² Even in the absence of a specific statute the discharge of one debtor in bankruptcy is not a bar to an action against those who were jointly liable with him on contract.³ Hence the discharge of a maker does not discharge the indorser,⁴

Philmon v. Marshall, 116 Ga. 811; 43 S. E. 48; *Evans v. Rounsaville*, 115 Ga. 684; 42 S. E. 100; *Stickney, etc., Co. v. Goodwin*, 95 Me. 246; 85 Am. St. Rep. 408; 49 Atl. 1039.

¹¹ *Frazee v. Nelson*, 179 Mass. 456; 88 Am. St. Rep. 391; 61 N. E. 40.

¹² *Rochester Lumber Co. v. Locke*, 72 N. H. 22; 54 Atl. 705.

¹³ *In re Francis-Valentine Co.*, 93 Fed. 953.

¹⁴ *Graham v. Richerson*, 115 Ga. 1002; 42 S. E. 374.

¹ See § 16 of act of 1898.

² Discharge of debtor does not affect liability of garnishee. *Marx v. Hart*, 166 Mo. 503; 89 Am. St. Rep. 715; 66 S. W. 260.

³ *Sandusky v. Bank*, 81 Ill. 353; *Post v. Losey*, 111 Ind. 74; 60 Am. Rep. 677; 12 N. E. 121; *Edwards v. Coleman*, 2 A. K. Mar. (Ky.) 249; *National Bank v. Sawyer*, 177 Mass. 490; 83 Am. St. Rep. 292; 59 N. E. 76; *Linn v. Hamilton*, 34 N. J. L. 305; *Childs v. Childs*, 10 O. S. 339; 75 Am. Dec. 512.

⁴ *National Bank v. Sawyer*, 177 Mass. 490; 83 Am. St. Rep. 292; 59 N. E. 76.

even if the note in question is not proved as a claim against the bankrupt's estate.⁵ If, however, the surety is held on a bond whereby he is liable only in case judgment is rendered against his principal, strong reasons exist for holding that the surety is not liable if the principal is discharged in bankruptcy, and invokes such discharge in the action in which such bond has been given and thereby prevents judgment from being rendered against him. "The cases are numerous in which it has been held, and we believe correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was to depend."⁶ For these reasons the discharge of the principal in bankruptcy has been held to discharge the surety from liability on a *capias* bond,⁷ a bond in attachment⁸ or an appeal bond.⁹ In other jurisdictions sureties on an attachment bond¹⁰ or a bond for re-delivery of goods taken on execution¹¹ are not released by the discharge of their principal in bankruptcy. Some cases reach this result in harmony with the general principles on the subject by holding that a special judgment, *pro forma* only,¹² or a judgment, execution on which is perpetually enjoined¹³ should be rendered against the bankrupt to fix the liability of the sureties. Discharge of a corporation in bankruptcy does not release the directors from liability for corporate debts,¹⁴ nor does it

⁵ *National Bank v. Sawyer*, 177 Mass. 490; 83 Am. St. Rep. 292; 59 N. E. 76.

⁶ *Wolf v. Stix*, 99 U. S. 1, 8; quoted in *Goyer Co. v. Jones*, 79 Miss. 253, 256; 30 So. 651.

⁷ *Bryant v. Kinyon*, 127 Mich. 152; 53 L. R. A. 801; 86 N. W. 531; *Barber v. Rodgers*, 71 Pa. St. 362.

⁸ *Johnson v. Collins*, 117 Mass. 343; *Braley v. Boomer*, 116 Mass. 527.

⁹ *Odell v. Wootten*, 38 Ga. 224; *Goyer Co. v. Jones*, 79 Miss. 253; 30

So. 651; *Knapp v. Anderson*, 71 N. Y. 466.

¹⁰ *Flagg v. Tyler*, 6 Mass. 33; *McCombs v. Allen*, 82 N. Y. 114.

¹¹ *Pinkard v. Willis*, 24 Tex. Civ. App. 69; 57 S. W. 891.

¹² *Rosenthal v. Nove*, 175 Mass. 559; 78 Am. St. Rep. 512; 56 N. E. 884. (Judgment provided for by statute.)

¹³ *Hill v. Harding*, 130 U. S. 699.

¹⁴ *In re Marshall Paper Co.*, 102 Fed. 872; 43 C. C. A. 38. It does not relieve them in equity. First

relieve stockholders from such liability.¹⁵ Discharge of a partner does not release his co-partner;¹⁶ and discharge of a mortgagor does not release a grantee from such mortgagor who has assumed and agreed to pay the mortgage debt.¹⁷

§1564. Partnership and individual debts.

A bankrupt may be discharged from his liability to the creditors of a partnership of which he is a member by a discharge given in bankruptcy proceedings affecting himself alone if due notice is given to the creditors of the partnership.¹ Hence partnership creditors may participate in individual insolvency and bankruptcy proceedings.² Under a state statute which requires a creditor who accepts a dividend from an estate assigned for the benefit of creditors to release the debtor from further claims, partnership proceedings will relieve the partners from their partnership and individual debts. Hence the assignment of a partnership which does not include individual property is void.³ If in individual proceedings a discharge is sought which will affect partnership debts such debts must be scheduled,⁴ notice must be given to partnership creditors⁵ and the petition in bankruptcy and the petition for discharge should refer to such debts and ask relief therefrom.⁶ In other jurisdictions it has been held that a discharge of an individual member of a firm does not bar his liability on partnership debts.⁷ In other juris-

National Bank v. Mfg. Co., 127 Mass. 563.

¹⁵ Elsbree v. Burt, 24 R. I. 322; 53 Atl. 60.

¹⁶ Abendroth v. Van Dolsen, 131 U. S. 66; Hill v. Trainer, 49 Wis. 537.

¹⁷ Childs v. Childs, 10 O. S. 339; 75 Am. Dec. 512.

¹ Tuckers v. Oxley, 5 Cranch (U. S.) 34; Jarecki Mfg. Co. v. McElwaine, 107 Fed. 249; Hawley v. Campbell, 62 Cal. 442; Clarke v. Stanwood, 166 Mass. 379; 34 L. R. A. 378; 44 N. E. 537; Curtis v. Woodward, 58 Wis. 499;

46 Am. Rep. 647; 17 N. W. 328.

² Clarke v. Stanwood, 166 Mass. 379; 34 L. R. A. 378; 44 N. E. 537.

³ McCord-Brady Co. v. Mills, 8 Wyom. 258; 46 L. R. A. 737; 56 Pac. 1003.

⁴ *In re Laughlin*, 96 Fed. 589; *In re Hartman*, 96 Fed. 593.

⁵ *In re Russell*, 97 Fed. 32; *In re Laughlin*, 96 Fed. 589; *In re McFaun*, 96 Fed. 592.

⁶ *In re McFaun*, 96 Fed. 592.

⁷ Glenn v. Arnold, 56 Cal. 631; Perkins v. Fisher, 80 Ky. 11.

dictions it has been held that a discharge cannot be granted in partnership proceedings to the partners as individuals.⁸

§1565. Method of taking advantage of discharge in bankruptcy.

A discharge in bankruptcy merely gives to the debtor an affirmative defense which he may waive, or of which he may avail himself at his election. The bankrupt himself may of course use his discharge as a defense. So may those claiming under him by succession, such as his widow.¹ Other persons² cannot compel the bankrupt to plead the discharge if he does not wish to, and cannot plead it to protect their own interests. If the bankrupt elects to avail himself of his discharge as a defense, he must plead his discharge in the action against him on the claim to which he seeks to interpose his discharge as a defense.³ If the bankrupt does not plead his discharge properly he waives the defense.⁴ If the debtor does not attempt to plead his discharge until after verdict, it is too late.⁵ Still more clearly is it too late if he waits till after final judgment and then attempts to avail himself of his discharge as a defense. So if the bankrupt does not plead his discharge in a foreclosure suit, but permits judgment to be taken therein, he cannot plead his discharge in a suit based upon the foreclosure decree to recover the balance due thereon.⁶ A judgment against a bankrupt after his discharge has been granted cannot be treated as a nullity. Thus, A and B were jointly liable. A obtained a discharge in bankruptcy. Subsequently the creditor obtained a judgment against A and B jointly, A not pleading his discharge in bankruptcy. Execution issued: A's property was levied on and sold and the judgment was satisfied on the record. Sub-

⁸ *In re Hale*, 107 Fed. 432 (involuntary proceedings); *In re Meyer*, 98 Fed. 976; 39 C. C. A. 368; *Strause v. Hooper*, 105 Fed. 590; *In re Barden*, 101 Fed. 553.

¹ *Upshur v. Briscoe*, 138 U. S. 365.

² *Bush v. Stanley*, 122 Ill. 406; 13 N. E. 249.

³ *Griffith v. Adams*, 95 Md. 170;

52 Atl. 66; *Lane v. Holcomb*, 182 Mass. 360; 65 N. E. 794; *Balk v. Harris*, 130 N. C. 381; 41 S. E. 940.

⁴ *Griffith v. Adams*, 95 Md. 170; 52 Atl. 66.

⁵ *Lane v. Holcomb*, 182 Mass. 360; 65 N. E. 794.

⁶ *Leisure v. Kneeland*, 2 Wash. 537; 26 Am. St. Rep. 888; 27 Pac. 176.

sequently in a proceeding to which B was not a party such sale was set aside and the satisfaction was vacated. The creditor then attempted to enforce the judgment against B on the theory that the judgment against A was absolutely void and hence the satisfaction was a nullity; and the judgment against B was valid and in full force. This theory was held to be untenable, the judgment against A being valid, and the satisfaction preventing the enforcement of the judgment against B.⁷ The pleading need not show the jurisdiction of the court of bankruptcy as this may be presumed.⁸ Some courts hold that the answer pleading a discharge must show notice to the creditor in question as provided for by statute;⁹ while other authorities hold that regularity in proceedings will be presumed, and it will accordingly be presumed that notice was given as required by law.¹⁰

§1566. New promise.

A discharge in bankruptcy does not discharge the debt itself but merely creates a bar to enforcing it, which the debtor may take advantage of, if he wishes. There is so great a difference between the discharge of a debt and its bar by bankruptcy, that a promise made by a third person to a creditor is supported by sufficient consideration if the creditor discharges the debtor from liability on a debt already barred by bankruptcy.¹ The debtor may accordingly prefer not to take advantage of his discharge; and may waive the bar thereof. Such a waiver may be effected by a new promise to pay a debt which is otherwise barred by such discharge.² Such a promise is enforceable if made after

⁷ Lackey v. Steere, 121 Ill. 598; 2 Am. St. Rep. 135; 13 N. E. 518.

⁸ Bryant v. Kinyon, 127 Mich. 152; 53 L. R. A. 801; 86 N. W. 531.

⁹ Balk v. Harris, 130 N. C. 381; 41 S. E. 940; Bailey v. Gleason, — Vt. —; 56 Atl. 537.

¹⁰ Jarecki Mfg. Co. v. McElwaine, 104 Fed. 249.

¹ Webster v. Le Compte, 74 Md. 244; 22 Atl. 232.

² Allen v. Ferguson, 18 Wall. (U. S.) 1; Lambert v. Schmalz, 118 Cal. 33; 50 Pac. 13; Willis v. Cushman, 115 Ind. 100; 17 N. E. 168; Thornberry v. Dils, 80 Ky. 241; Brooks v. Paine (Ky.), 77 S. W. 190; Way v. Sperry, 6 Cush. (Mass.) 238; 52 Am. Dec. 779; Craig v. Seitz, 63 Mich. 727; 30 N. W. 347; Smith v. Stanchfield, 84 Minn. 343; 87 N. W. 917; Wislizenus v. O'Fallon, 91 Mo. 184; 3 S. W. 837;

the proceedings in bankruptcy have been instituted but before a discharge has been granted.³ It has, however, been held that in order to waive the bar, the new promise must be made after discharge and before suit is brought upon the debt.⁴ Such new promise may be enforced by the assignee of the claim which the debtor thus promises to pay.⁵ In order to revive a debt which has been barred by a discharge in bankruptcy an express promise is necessary.⁶ A note given for such pre-existing debt is a sufficient express promise.⁷ So is a confession of judgment for such debt.⁸ Such promise must be clear and unequivocal.⁹ It is often said that such a promise must be unconditional.¹⁰ This means nothing more, however, than that such a promise is unenforceable if a condition is annexed thereto which is not fulfilled.¹¹ Thus a promise by the debtor to the creditor to pay a debt barred by bankruptcy if he were given time is unenforceable if it is not shown that such offer was accepted and a definite time fixed for extension.¹² If the debtor offers to pay in installments and the creditor refuses this offer, there is no new contract, and the bar of the statute is not waived.¹³ On the other

Dusenbury v. Hoyt, 53 N. Y. 521; 13 Am. Rep. 543; *Turner v. Chrisman*, 20 Ohio 332; *Murphy v. Crawford*, 114 Pa. St. 496; 7 Atl. 142; *Hobough v. Murphy*, 114 Pa. St. 358; 7 Atl. 139.

³ *Allen v. Ferguson*, 18 Wall. (U. S.) 1; *Knapp v. Hoyt*, 57 Ia. 591; 42 Am. Rep. 59; 10 N. W. 925; *Lerow v. Wilmarth*, 7 All. (Mass.) 463; 83 Am. Dec. 701; *Hill v. Trainer*, 49 Wis. 537; 5 N. W. 926.

⁴ *Thornton v. Nichols*, 119 Ga. 50; 45 S. E. 785.

⁵ *Wolffe v. Eberlein*, 74 Ala. 99; 49 Am. Rep. 809; *Badger v. Gilmore*, 33 N. H. 361; 66 Am. Dec. 729.

⁶ *Shockey v. Mills*, 71 Ind. 288; 36 Am. Rep. 196; *Turner v. Chrisman*, 20 Ohio 332; *Dyer v. Isham*, 4 Ohio C. C. 429; 2 Ohio C. D.

633; *Bolton v. King*, 105 Pa. St. 78.

⁷ *Christie v. Bridgman*, 51 N. J. Eq. 331; 25 Atl. 939; 30 Atl. 429.

⁸ *Dewey v. Moyer*, 72 N. Y. 70.

⁹ *Meech v. Lamon*, 103 Ind. 515; 53 Am. Rep. 540; 3 N. E. 159; *Brewer v. Boynton*, 71 Mich. 254; 39 N. W. 49; *Smith v. Stanchfield*, 84 Minn. 343; 87 N. W. 917; *Riggs v. Roberts*, 85 N. C. 151; 39 Am. Rep. 692; *McDougall v. Page*, 55 Vt. 187; 45 Am. Rep. 602.

¹⁰ *Egbert v. McMichael*, 9 B. Mon. (Ky.) 44; *Bigelow v. Norris*, 139 Mass. 12; 29 N. E. 61; *Brown v. Collier*, 8 Humph. (Tenn.) 510.

¹¹ *Smith v. Stanchfield*, 84 Minn. 343; 87 N. W. 917.

¹² *Smith v. Stanchfield*, 84 Minn. 343; 87 N. W. 917.

¹³ *International Harvester Co. v. Lyman*, 90 Minn. 275; 96 N. W. 87.

hand, if the condition annexed to such promise is fulfilled, the promise is enforceable.¹⁴ Thus if the debtor promises to pay "when he is able" such promise is enforceable on proof that he is able.¹⁵ An oral promise to pay such debt is sufficient in the absence of statute,¹⁶ though if the statute specifically requires a written contract to be enforceable, such contract cannot be enforced if not in writing.¹⁷

§1567. Nature of liability created by new promise.

Whether the new promise creates a new liability supported by the original liability as a consideration, or whether the new promise merely waives the bar of the discharge and leaves the original liability in force is a question upon which there is a conflict of authority. Some authorities hold that the liability is on the new promise;¹ while other authorities treat the liability as being on the original claim.² No good reason appears for refusing to hold that either theory of the nature of the debtor's liability may be entertained. The courts generally assume, however, that one or the other of these theories must be entertained to the exclusion of the alternative.

§1568. Part payment.

Since a new promise to pay a debt barred by bankruptcy, must, to be enforceable against the debtor, be clear and unequivocal, a part payment of a debt is not of itself sufficient to waive

¹⁴ *Griel v. Solomon*, 82 Ala. 85; 60 Am. Rep. 733; 2 So. 322; *Eckler v. Galbraith*, 12 Bush. (Ky.) 71; *Sherman v. Hobart*, 26 Vt. 60.

¹⁵ *Taylor v. Nixon*, 4 Sneed (Tenn.) 352.

¹⁶ *Ross v. Jordan*, 62 Ga. 298; *Marshall v. Tracy*, 74 Ill. 379; *Smith v. Stanchfield*, 84 Minn. 343; 87 N. W. 917.

¹⁷ *Jacobs v. Carpenter*, 161 Mass. 16; 36 N. E. 676; *Farmers', etc., Bank v. Flint*, 17 Vt. 508; 44 Am. Dec. 351.

¹ *Carson v. Osborne*, 10 B. Mon. (Ky.) 155; *Egbert v. McMichael*, 9 B. Mon. (Ky.) 44; *Fraley v. Kelly*, 88 N. C. 227; 43 Am. Rep. 743; *Hobough v. Murphy*, 114 Pa. St. 358; *In re Field*, 2 Rawle (Pa.) 351; 21 Am. Dec. 454.

² *Nowland v. Lanagan*, 45 Ark. 108; *Classen v. Schoenemann*, 80 Ill. 304; *Badger v. Gilmore*, 33 N. H. 361; 66 Am. Dec. 729; *Dusenbury v. Hoyt*, 53 N. Y. 521; 13 Am. Rep. 543; *Turner v. Chrisman*, 20 Ohio 332.

the bar of bankruptcy.¹ This is so whether the part payment is made after the discharge in bankruptcy has been granted,² or after proceedings in bankruptcy have been begun and before the discharge in bankruptcy has been granted.³

¹ *Tolle v. Smith's Executor*, 98 (Mass.) 77; 48 Am. Dec. 591; *Dyer v. Isham*, 4 Ohio C. C. 429; 2 Ohio C. D. 633.
Ky. 464; 33 S. W. 410; *Cambridge Savings Institution v. Littlefield*, 6 Cush. (Mass.) 210.

³ *Heim v. Chapman*, 171 **Mass.** 347; 50 N. E. 529.

² *Merriam v. Bayley*, 1 Cush.

PART VIII.

REMEDIAL RIGHTS ARISING ON DISCHARGE.

CHAPTER LXXIII.

DAMAGES.

I. GENERAL NATURE.

§1569. Election of remedies.

A brief discussion of the remedies available in case of breach is necessary to a complete understanding of the effects and consequences of certain of the forms of discharge. In case of breach amounting to a discharge the party not at fault had at Common Law an election between two theories of his case. He could sue on the contract and recover damages for its breach; or if he had parted with anything of value thereunder for which he had not been compensated he could ignore the contract and sue to recover a reasonable compensation therefor. These two theories of the case will be discussed in this chapter and the one following.

It may here be noted that this right of election belongs to the party not at fault. If he wishes to recover damages the adversary party cannot compel him to sue to recover merely what he has expended under the contract.¹ The right of the party not in default to demand repayment, given by the terms of the contract, does not exclude his right to recover damages.² Under proper circumstances equity will give the affirmative relief of specific performance or the negative relief of injunction. These forms of relief will be discussed subsequently.

§1570. Theory of damages.

Whether or not a breach of a contract amounts to a discharge of the executory covenants of the party not in default,¹ it gives

¹ *Peck-Hammond Co. v. Heifner*,
136 Ala. 473; 96 Am. St. Rep. 36;
33 So. 807.

² *Knowlson v. Piehl*, 130 Mich.
597; 90 N. W. 415.

¹ See Ch. LXX.

to such party a right of action at law for damages. As is said elsewhere,² the constant attempt of the King's Courts when established by Henry II., and for a considerable space of time thereafter, was to make relief as specific as possible. A party to a contract was constantly compelled to do what he had agreed to do. This idea, however, was gradually abandoned by the King's Common Law Courts, and by the classic period of the Common Law it became established that the only relief which could be given by the ordinary forms of action was compensation in money damages, and not specific relief. This general theory controls everywhere as to the form of relief to be given for breach of contract by an action at law. The question, therefore, at law in case of breach, is merely what amount of damages can be recovered. If it is sought to compel the party in default to do the very thing that he agreed to do, relief must be sought in equity. Under what circumstances this form of relief may be had is discussed elsewhere.³ The refusal of the Common Law to give any relief except damages has given rise to a controversy chiefly academic in character, as to what the true obligation of a contract is. Is the promisor bound in law to do what he agrees to do; or is he merely bound in the alternative either to do that or to pay such damages as may arise from his refusal to do it? The solution of this question depends upon the extent to which primary rights are embodied in the remedial rights which arise on their violation. If there is no primary right apart from the remedial right; or if the invasion of the primary right does away with it so completely that only the remedial right thus created exists, it is probably correct to say that in law the obligation of an executory contract is alternative in law, either to perform or to pay damages. In proper cases, however, a party may be compelled in equity to do the thing which he agrees to do. It is anomalous, to say the least, to treat the obligation of a contract as varying with the jurisdiction before which it may come, especially in view of the fact that it is often not merely the nature of the contract, but also the facts in the nature of

² See § 1606.

³ See Ch. LXXV.

performance, arising subsequent thereto, that determine whether specific performance can be had or not. Furthermore it seems that a change of law, giving specific performance where none could be had before, does not impair the obligation of pre-existing contracts.⁴ If this is true the obligation is solely to do what the party has agreed to do. The question is largely theoretical and need not detain us longer. Whether by original obligation, or by defect in legal remedy, the injured party in an action on the contract at law, for breach thereof must seek compensation in money damages. The right to damages depends on the fact of breach by the party against whom relief is sought. Whatever loss may be suffered by one party as the result of a valid contract into which he has entered, he cannot recover damages from the adversary party if the latter has not been guilty of some breach.⁵

§1571. Classes of damages.—Nominal damages.

In actions in tort damages are of three general classes: nominal; compensatory and punitive. In contract the general rule is that damages must be compensatory. The exceptions to this general rule, and the effect of the rule itself must next be considered. Nominal damages may be given in one class of cases. If there is a breach of contract, and no actual damage is shown to have followed therefrom, nominal damages only can be given.¹ Thus if A agrees to effect insurance on B's property, and does not do so, B cannot, after loss, recover the amount of such insur-

⁴ See § 1765 *et seq.*

⁵ *Gallagher v. St. Patrick's Church*, 45 Neb. 535; 63 N. W. 864; *Chamberlain v. Hibbard*, 26 Or. 428; 38 Pac. 437; *Robinson v. Baird*, 165 Pa. St. 505; 30 Atl. 1010; *Brodek v. Farnum*, 11 Wash. 565; 40 Pac. 189.

¹ *Troy Laundry Machinery Co. v. Dolph*, 138 U. S. 617; *Gruell v. Clark*, — Del. —; 54 Atl. 955; *Williamson County v. Farson*, 199 Ill. 71; 64 N. E. 1086; affirming 101 Ill. App. 328; *Rosenbaum v. McThomas*, 34 Ind. 331; *Tufts v. Bennett*, 163

Mass. 398; 40 N. E. 172; *Detroit Gas Co. v. Storage Co.*, 111 Mich. 401; 69 N. W. 659; *Lee v. Normal School Co.*, 1 Neb. (Unofficial) 681; 96 N. W. 65; *Jewett v. Wilmot*, 51 Neb. 700; 71 N. W. 775; *New Jersey, etc., Co. v. Board of Education*, 58 N. J. L. 646; 35 Atl. 397; *Streator v. Paxton*, 201 Pa. St. 135; 50 Atl. 926; *Lancaster Mills v. Cotton-Press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586; 13 L. R. A. 518; 14 S. W. 317; *Fisher v. Mfg. Co.* (Tenn. Ch. App.), 62 S. W. 27; *Douglass v. Ry.*, 51 W. Va. 523; 41 S. E. 911.

ance where B has already insured such property.² So if a corporation is formed to furnish its members with natural gas at a reduced price; and to secure such reduction it is provided that no member shall sell his stock to any person outside of the corporation until the members have had an opportunity to buy, it is held that no actual damages can be recovered, where such sale of stock is made in breach of the contract if by contract with the vendee of such stock the reduced price of gas is maintained.³ So if no damage is shown to arise from a failure to do certain work at the time stipulated, no actual damages can be recovered.⁴ A agreed to deposit money to take up certain bonds. A did not make such deposit but paid all bonds as presented. It was not shown that the holders of outstanding bonds had such notice that the fact of making the deposit would stop interest on their bonds. It was held that A was liable only for nominal damages for such breach.⁵ Thus no recovery can be had for breach of a contract to manufacture and lease patented machines if it is not shown that there was some demand therefor.⁶ So only nominal damages can be given for breach of a contract not to compete if no actual damages are shown to exist.⁷ If the contract left performance practically optional with the party in default only nominal damages can be recovered. Thus only nominal damages can be recovered for breach of a contract to furnish news items not to exceed three hundred dollars a week.⁸ If the breach is such that actual damage might result the court is not justified in assuming as a matter of law that the damages are merely nominal. Thus where A agreed to make drop-forgings for B for one year as B should order them, A to ship them to B's customers, according to B's directions, it cannot be assumed that the orders received by B would be so small as to be without

² Lancaster Mills v. Cotton-Press Co., 89 Tenn. 1; 24 Am. St. Rep. 586; 13 L. R. A. 518; 14 S. W. 317.

³ Streator v. Paxton, 201 Pa. St. 135; 50 Atl. 926.

⁴ Malloy v. Cotton Mills, 132 N. C. 432; 43 S. E. 951.

⁵ Williamson County v. Farson,

199 Ill. 71; 64 N. E. 1086; affirming 101 Ill. App. 328.

⁶ Doane v. Preston, 183 Mass. 569; 67 N. E. 867.

⁷ Diers v. Edwards (Ky.), 63 S. W. 276.

⁸ United Press v. Press Co., 164 N. Y. 406; 53 L. R. A. 288; 58 N. E. 527.

profit.⁹ So if a contract to remove earth and leave the surface in a smooth condition is broken by leaving it rough, the court cannot say as a matter of law that no damage followed.¹⁰ Substantial damages may be recovered for unwarranted refusal to honor a check.¹¹ Nominal damages at least should be recovered for breach of contract.¹² Thus if a contract not to re-engage in business is broken, nominal damages, at least, should be allowed.¹³ Nominal damages may be recovered even if it is shown affirmatively that the party complaining of the breach was a gainer and not a loser by reason of such breach. Thus nominal damages may be given where the contractor is forbidden by the adversary party to proceed with the performance of his contract, though it is shown that it would cost more than the contract price to complete the contract.¹⁴ So nominal damages may be recovered for breach of a contract by a vendor of realty, though the contract price was higher than the market price.¹⁵ The same rule applies in sales of personalty.¹⁶

§1572. Punitive damages.

The general rule is that damages for breach of contract must be compensatory only, and not punitive.¹ There are, however, certain classes of cases in which punitive damages are sometimes

⁹ Speirs v. Drop-Forge Co., 180 Mass. 87; 61 N. E. 825.

¹⁰ Colburn v. Ry., 109 Wis. 377; 85 N. W. 354.

¹¹ American National Bank v. Morey, — Ky. —; 58 L. R. A. 956; 69 S. W. 759; Wiley v. Bank, 183 Mass. 495; 67 N. E. 655.

¹² Radloff v. Haase, 196 Ill. 365; 63 N. E. 729; reversing 96 Ill. App. 74; Grinnell v. Bebb, 126 Mich. 157; 85 N. W. 467; Turner v. Carter, 1 Head (Tenn.) 520; Raymond v. Yarrington, 96 Tex. 443; 97 Am. St. Rep. 914; 73 S. W. 800; reversing (Tex. Civ. App.), 69 S. W. 436; Fullam v. Stearns, 30 Vt. 443.

¹³ Radloff v. Haase, 196 Ill. 365;

63 N. E. 729; reversing 96 Ill. App. 74; Raymond v. Yarrington, 96 Tex. 443; 97 Am. St. Rep. 914; 73 S. W. 800; reversing (Tex. Civ. App.), 69 S. W. 436.

¹⁴ Jewett v. Wilmot, 51 Neb. 700; 71 N. W. 775.

¹⁵ Carver v. Taylor, 35 Neb. 429; 53 N. W. 386.

¹⁶ Koch v. Godshaw, 12 Bush. (Ky.) 320; Barnes v. Brown, 130 N. Y. 372; 29 N. E. 760; Zipp v. Rubber Co., 12 S. D. 218; 80 N. W. 367.

¹ Snow v. Grace, 25 Ark. 570; Hoy v. Gronoble, 34 Pa. St. 9; 75 Am. Dec. 628; Gordon v. Brewster, 7 Wis. 355.

given. These are cases of contracts personal or quasi-personal in their nature, a breach of which under circumstances of wantonness may cause disgrace, humiliation or great injury to the feelings of the injured party. A breach of a contract to marry may be attended with such circumstances of injury to the feelings as to justify the award of punitive damages.² So if the failure to deliver a telegram announcing the death of a near relative is due to gross negligence,³ or to deliberate intention,⁴ on the part of the telegraph company, punitive damages may be allowed. Punitive damages are allowed for breach of contract by a common carrier under special circumstances. Thus if a carrier takes a passenger beyond his destination, either through wilfulness or through gross negligence,⁵ punitive damages may be allowed. It is evident, however, that these are apparent rather than real exceptions to the general rule. While these rights are founded upon contract, the actions are in effect actions in tort, and are governed by the rules of damages applicable in case of tort and not by those applicable in case of contract.

§1573. Intention of party in default as affecting damages.

The intention of the party in default is, however, ordinarily immaterial. Hence, if there is an unintentional breach of the contract, compensatory damages and not nominal damages must be given.¹ On the other hand, no matter how bad the intention of the party in default may be, the ordinary rule is that no more

² *Jacoby v. Stark*, 205 Ill. 34; 68 N. E. 557; *Coolidge v. Neat*, 129 Mass. 146; *Goddard v. Westcott*, 82 Mich. 180; 46 N. W. 242; *Hahn v. Bettingen*, 84 Minn. 512; 88 N. W. 10; *Thorn v. Knapp*, 42 N. Y. 474; 1 Am. Rep. 561; *White v. Thomas*, 12 O. S. 313; 80 Am. Dec. 347; *Duvall v. Fuhrman*, 2 Ohio C. D. 174; *Brown v. Odill*, 104 Tenn. 250; 78 Am. St. Rep. 914; 52 L. R. A. 660; 56 S. W. 840. *Contra*, that while allowance might be made for humiliation as compensatory dam-

ages, punitive damages could not be allowed even if defendant's conduct was malicious. *Trammell v. Vaughan*, 158 Mo. 214; 81 Am. St. Rep. 302; 51 L. R. A. 854; 59 S. W. 79.

³ *Western Union Telegraph Co. v. Lawson*, 66 Kan. 660; 72 Pac. 283.

⁴ *Butler v. Telegraph Co.*, 65 S. C. 510; 44 S. E. 91.

⁵ *Birmingham, etc., Co. v. Nolan*, 134 Ala. 329; 32 So. 715.

¹ *Cornell v. Rodabaugh*, 117 Ia. 287; 94 Am. St. Rep. 298; 90 N. W. 599.

than compensatory damages may be given. Thus if a bank wrongfully refuses to honor a check drawn upon it,² or the payee of a paid note sends it to a bank for collection again,³ actual but not punitive damages, can be given. To this rule, however, there is one class of exceptions. There are certain contracts which are personal or quasi-personal in their character, the breach of which may be attended by circumstances of indignity or insult, for which punitive damages may be given.⁴

§1574. Compensatory damages.

Apart from the few instances referred to in the preceding sections, in which either nominal or punitive damages may be allowed, the general rule of the law of damages, namely, that compensation is to be sought as far as is practicable applies with especial force to contract law. The law attempts to place the party injured by the default of his adversary in the position which he would have had if such adversary had performed, as nearly as can be done by means of a judgment for money.¹ Like most general rules, however, this proposition does not furnish the means of solving the questions as they actually arise, but only states a general tendency of the courts. The difficulty found in this connection, is in determining what items of loss can be considered in determining the amount of actual damages. In determining what elements of loss are to be considered in estimating the amount of compensatory damages, the loss to the party in default, caused by the breach, may come under one of five classes. (1) The damages may be such as would arise according to the usual course of things from such a breach of the contract as that involved.² (2) The damages may not be such

² American National Bank v. Morey, — Ky. —; 58 L. R. A. 956; 69 S. W. 759. At least, if no intent to injure by such refusal is shown to exist. Wood v. Bank, 100 Va. 306; 40 S. E. 931.

³ State, etc., Association v. Baldwin, 116 Ga. 855; 43 S. E. 262.

⁴ See § 1572.

¹ Worthington v. Given, 119 Ala. 44; 43 L. R. A. 382; 24 So. 739; Hoyle v. Stellwagen, 28 Ind. App.

681; 63 N. E. 780; Hurxthal v. Lumber Co., 53 W. Va. 87; 44 S. E. 520.

² "When two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i. e., according to the usual

as would, in the natural course of things, arise from such a breach of the contract; but the parties may, by their express stipulation, have provided for a special course of things, and the damages may follow from such special course of things thus provided for. (3) The damages may be such as would not follow in the usual course of things, but they may follow from a special course of things not provided for in the contract but known to the party in default as contemplated and intended by the adversary party. (4) The damages may be such as do not follow from the ordinary course of things, but they may follow from a special course of things which the party in default knows will probably follow, though he is not positively notified of such fact. (5) The damages may be such as do not follow in the ordinary course of things, but do follow from a course of things contemplated and intended by the injured party, but not known to exist by the party in default. The first of these classes consists of the damages which arise in the usual course of things as a consequence of the breach. These damages are given by the law, without proof of any especial facts and circumstances.³ Any more exact statement of this rule requires a consideration in detail of the special types of contract. In this connection, we will select characteristic and typical examples, without at-

course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of breach of it." *Hadley v. Baxendale*, 9 Exch. 341 (353); quoted in *Taylor Mfg. Co. v. Hatcher*, 39 Fed. 440, 447; 3 L. R. A. 587; *J. Wragg & Sons v. Mead*, 120 Ia. 319; 94 N. W. 856.

³ *Van Arsdale v. Rundel*, 82 Ill. 63; *Illinois Central Ry. v. Cobb*, 64 Ill. 128; *Cornell v. Rodabaugh*, 117 Ia. 287; 94 Am. St. Rep. 298; 90 N. W. 599; *Cobb v. Ry.*, 38 Ia. 601;

Connolly v. Sullivan, 173 Mass. 1; 53 N. E. 143; *Squire v. Telegraph Co.*, 98 Mass. 232; 93 Am. Dec. 157; *Wright v. Iron Co.*, 129 Mich. 543; 89 N. W. 335; *Coxe v. Power Co.*, 87 Minn. 56; 91 N. W. 265; *Jewett v. Wilmot*, 51 Neb. 700; 71 N. W. 775; *Hexter v. Knox*, 63 N. Y. 561; *Talbot v. Boyd*, 11 N. D. 81; 88 N. W. 1026; *Kelly v. Wheel Co.*, 62 O. S. 598; 57 N. E. 984; *Smith v. Lime Co.*, 57 O. S. 518; 49 N. E. 695; *Kinports v. Breon*, 193 Pa. St. 309; 44 Atl. 436; *Rhoades v. Ry.*, 49 W. Va. 494; 87 Am. St. Rep. 826; 55 L. R. A. 170; 39 S. E. 209.

tempting to make an exhaustive enumeration of all the different forms of contract which may be broken.

§1575. Certainty.

As with other questions of fact, damages must be proved with at least reasonable certainty. They cannot be ascertained by mere speculation and conjecture.¹ Accordingly, if there are no data for computing the amount of damages no substantial damages can be given even if it is clear from the evidence that some damage has been sustained.² So where defective goods were sold by a wholesaler to a retailer, injury to the retailer's trade is too uncertain to form a basis of recovering damages.³ As between two or more possible rules for the measure of damages the law prefers the most certain. Thus on breach of a contract to give a free pass for life, the measure of damages has been held to be the amount actually spent on railroad fare.⁴ This rule often prevents recovery of profits contemplated by the injured party. Thus on breach of a contract to make a lease of certain realty to be used as a peach orchard, which breach consisted in evicting plaintiff within two years after he had taken possession; and after he had planted the peach trees, it was held that future profits could not be recovered, but that the measure of damages was the value of the plaintiff's interest in the orchard at the time of eviction.⁵ On breach of a contract of employment, the employe to be paid by commissions, he may in case of wrongful discharge recover compensation for his time and expenses;⁶ or his reasonable expenses in advertising and commissions on orders actually secured by him before his discharge.⁷ So under a contract whereby A is to make certain tests of his patent and B is to manufacture and sell such inven-

¹ *Jemmisson v. Gray*, 29 Ia. 537; *Paxton v. Vadbouker*, 1 Neb. (Unofficial) 776; 96 N. W. 378; *Douglass v. Ry.*, 51 W. Va. 523; 41 S. E. 911.

² *Louisville Bridge Co. v. Ry.*, — Ky. —; 75 S. W. 285.

³ *Jackson Sleigh Co. v. Holmes*, 129 Mich. 370; 88 N. W. 895.

⁴ *Curry v. Ry.*, 61 Kan. 541; 60 Pac. 325.

⁵ *Rhodes v. Baird*, 16 O. S. 573.

⁶ *Cadman v. Markle*, 76 Mich. 448; 5 L. R. A. 707; 43 N. W. 315.

⁷ *Taylor Mfg. Co. v. Hatcher*, 39 Fed. 440; 3 L. R. A. 587.

tion, A may recover for the expenses of the tests and the value of his time where B sells out his business before performing the contract.⁸ However, if a certain minimum amount of damages is shown, that, at least, may be recovered, though the evidence may show that the damages were greater than such amount by some uncertain sum.⁹

§1576. Remote damages.

As a necessary deduction from the rule that damages are recoverable only if they flow from the breach in the natural course of events or are within the contemplation of the parties, it follows that damages so remote as to fall without these rules cannot be recovered. It often happens that profits which the injured party hoped to realize out of the transaction fall within this rule; or partly within this rule and partly within the rule that damages must be certain;¹ or partly within the rule that only such special circumstances as are within the contemplation of the parties can be considered in estimating damages.² Thus on breach of contract by a landlord to repair a dwelling house, no recovery can be had by the tenant for loss of profits caused by the interruption to business.³ So on breach of a covenant to renew a lease, future profits that would be made thereby cannot be recovered.⁴ So on breach of a contract to complete a railroad, loss of profits that would have been made on shipments is too remote.⁵ So if a vessel contracted for is not delivered in time, loss of profits is too remote. The measure of damages is interest on the amount paid in advance for the time of delay.⁶ So it has been held that on breach of a contract to sell a patent-right, profits of a contemplated resale cannot

⁸ *Griffen v. Electric Co.*, 115 Fed. 749.

⁹ *Wakeman v. Mfg. Co.*, 101 N. Y. 205; 54 Am. Rep. 676; 4 N. E. 264.

¹ See § 1575.

² *Stoddard v. Treadwell*, 26 Cal. 294; *Somers v. Wright*, 115 Mass. 292; *Mason v. Howes*, 122 Mich. 329; 81 N. W. 111; *White v. Mil-*

ler, 71 N. Y. 118; 27 Am. Rep. 13.

³ *Mason v. Howes*, 122 Mich. 329; 81 N. W. 111.

⁴ *Grubb v. Burford*, 98 Va. 553; 37 S. E. 4.

⁵ *Atlantic, etc., Ry. v. Construction Co.*, 98 Va. 503; 37 S. E. 13.

⁶ *De Ford v. Steel Co.*, 113 Fed. 72.

be recovered.⁷ So damages arising from breach of a contract to locate a business in a specified city and to maintain it for five years, which damage consists in injury to the value of the promisee's property, is too remote.⁸ On the other hand, damages caused by loss of grain by shelling out, owing to a delay in cutting it, are not too remote in an action for breach of such contract by reason of such delay.⁹ So on a sale of diseased animals, infection of sound animals by being placed with the diseased animals is not too remote.¹⁰

§1577. Profits.

There is no arbitrary rule forbidding the recovery of profits as such. If they follow naturally from the breach, are not too remote and can be proved with sufficient certainty, there is no reason why they may not be considered as an element of damage.¹ Thus under a contract by A to supply cars to B to haul timber which B had agreed to sell to X, B may recover the profits of such resale if A does not furnish cars.² If the vendor does not deliver the goods which he has agreed to deliver and he knows that the vendee is buying them to deliver under an existing or contemplated contract of resale, and contracts in contemplation thereof, the loss of profits by reason of such resale may be recovered.³ If a contract is made to deliver machinery

⁷ *Skirm v. Hilliker*, 66 N. J. L. 410; 49 Atl. 679.

⁸ *Fitzsimmons v. Chapman*, 37 Mich. 139; 26 Am. Rep. 508; *Hudson v. Archer*, 9 S. D. 240; 68 N. W. 541.

⁹ *Holt Mfg. Co. v. Thornton*, 136 Cal. 232; 68 Pac. 708.

¹⁰ *Skinn v. Reutter*, — Mich. —; 63 L. R. A. 743; 97 N. W. 152.

¹ *Baxley v. R. R.*, 128 Ala. 183; 29 So. 451; *Watson v. Kirby*, 112 Ala. 436; 20 So. 624; *Silver Springs, etc., Ry. v. Van Ness*, — Fla. —; 34 So. 884; *Rule v. McGregor*, 117 Ia. 419; 90 N. W. 811; *Schrandt v. Young*, 62 Neb. 254; 86 N. W.

1085; *Herring v. Armwood*, 130 N. C. 177; 57 L. R. A. 958; 41 S. E. 96; *Hamilton v. R. R.*, 96 N. C. 398; 3 S. E. 164.

² *Baxley v. R. R.*, 128 Ala. 183; 29 So. 451.

³ *Denhard v. Hirst*, 111 Ky. 546; 64 S. W. 293; *Harrow Spring Co. v. Harrow Co.*, 90 Mich. 147; 30 Am. St. Rep. 421; 51 N. W. 197; *Ellis v. Miller*, 164 N. Y. 434; 58 N. E. 516; *Hockersmith v. Hanley*, 29 Or. 27; 44 Pac. 497; *Perry, etc., Co. v. Rennolds*, 100 Va. 264; 40 S. E. 919; *Jones v. Foster*, 67 Wis. 296; 30 N. W. 697.

and the vendor does not deliver it, thereby causing a delay in the operation of the entire establishment for which such machinery was bought, and the vendor knows that his delay has such effect, some liability rests upon vendor by reason of such facts. If failure to receive this machinery has not prevented the operation of the rest of the mill or factory the measure of damages for delay is the value of the use of the machinery.⁴ If the vendor has no other notice of special loss caused by his delay he is liable for fair rental value of that part of the mill kept idle during the time lost by reason of the breach.⁵ If no market value for rental can be shown, the interest on the capital kept idle, and such losses as insurance, idle labor, deterioration in value and the like may be considered, but not the loss of profits.⁶ So if defective machinery is delivered and blows up, delaying the operation of the cotton-press for use in connection with which it was sold, the rental value of such cotton-press may be recovered.⁷ Delay in delivering a gas-holder until just at the end of that part of the year at which its use is needed, makes the vendor liable for the interest on the money paid in and on the cost of the realty bought for such purpose.⁸ If the vendor knows that the vendee is expecting to perform outstanding contracts by means of such machinery he is liable for loss of profits due to such delay,⁹ if other machinery cannot be obtained.¹⁰ So loss of profits on existing contracts has been given for breach of a contract for repairing machinery.¹¹ So on breach of a contract to deliver machinery to a mill, damages to cotton seed caused by delay in delivering such machinery may be re-

⁴ Champion, etc., Co. v. Iron Works, 68 O. S. 229; 67 N. E. 486.

⁵ Tompkins v. Cotton Mills, 130 N. C. 347; 41 S. E. 938.

⁶ Sharpe v. Ry., 130 N. C. 613; 41 S. E. 799.

⁷ Machine Co. v. Compress Co., 105 Tenn. 187; *sub nomine*, Livermore Foundry & Machine Co. v. Compress Co., 53 L. R. A. 482; 58 S. W. 270.

⁸ Wood v. Gaslight Co., 111 Fed. 463; 49 C. C. A. 427.

⁹ Central, etc., Co. v. Hartman, 111 Fed. 96; 49 C. C. A. 244; Dillie v. Ratcliff, 29 Tex. Civ. App. 545; 69 S. W. 237.

¹⁰ Bates Machine Co. v. Iron Works, — Ky. —; 68 S. W. 423.

¹¹ Pender Lumber Co. v. Iron Works, 130 N. C. 584; 41 S. E. 797.

covered.¹² So if the vendor knows that the vendee needs such machinery to use in harvesting a certain crop, his failure to deliver makes him liable for injury to such crop.¹³ The right to recover such anticipated profits has, however, been denied in some cases. A vendor agreed to deliver a machine for making bicycle hubs; but did not deliver such machine. It was held that though there was a great demand for bicycle hubs, no recovery could be had for loss of profits which would have been earned had such machine been delivered.¹⁴ If the contract is entered into to provide for earning and dividing profits, the amount of future profits is the only measure of damages on principles of contract. Such profits furnish the measure of damages under a contract to divide profits earned by feeding steers,¹⁵ or to divide the increase of a flock of sheep and the wool clip.¹⁶ So on breach of a contract to furnish fertilizer, the loss caused thereby is not too remote and may be recovered.¹⁷ On breach of a contract to furnish a telephone the measure of damages is the value of the telephone to the user.¹⁸

§1578. Contract with reference to special course of things.

The law allows all damages which may reasonably be presumed to have been within the contemplation of the parties when they made the contract.¹ Accordingly if special circumstances, out of the usual course of things, are known to both parties and

¹² Colvin v. Oil Co., 66 S. C. 61; 44 S. E. 380.

¹³ Neal v. Hardware Co., 122 N. C. 104; 65 Am. St. Rep. 697; 29 S. E. 96.

¹⁴ Acme Cycle Co. v. Clarke, 157 Ind. 271; 61 N. E. 561.

¹⁵ Rule v. McGregor, 117 Ia. 419; 90 N. W. 811. (A case arising out of a refusal to furnish steers to be fed. Probable expenses for extra help; and the amount actually received by the injured party for his own labor during the term of the contract should be deducted.)

¹⁶ Schrandt v. Young (Neb.), 89 N. W. 607; 62 Neb. 254; 86 N. W. 1085.

¹⁷ Herring v. Armwood, 130 N. C. 177; 57 L. R. A. 958; 41 S. E. 96.

¹⁸ Zabel v. Telephone Co., 127 Mich. 402; 86 N. W. 949. But such measure of damages was denied in the absence of proof of special damages. Cumberland, etc., Co. v. Hendon, — Ky. —; 60 L. R. A. 849; 71 S. W. 435.

¹ Spencer v. Hamilton, 113 N. C. 49; 37 Am. St. Rep. 611; 18 S. E. 167.

they contract with reference thereto, the damages which follow breach and are occasioned by such special course of things must be awarded to the party not in default as compensation.² It seems to be held, however, that mere knowledge of the special circumstances is not sufficient unless it further appears as an established fact, that the parties contracted with reference to such circumstances.³ If a contract to deliver pipe is broken and the vendor knows that the vendee has, in reliance upon such contract, dug a trench to lay such pipe, it cannot be said as a matter of law that the vendor is not liable for the cost of re-digging, which has become necessary because, while the vendee was delayed by the vendor's breach, the rain washed the dirt back into the trench.⁴ Thus A agreed to deliver a monument in the spring to B, and B had resold it to X. A repudiated his contract in December. It was held that the difficulty of getting stock for a monument during the winter should be considered in estimating damages.⁵

§1579. Effect of provision in contract for special course of things.

If by the terms of their contract the parties provide for a special course of things, damages which follow a breach and arise out of such special course of things are as much the natural

² Hadley v. Baxendale, 9 Exch. 341; Kramer v. Messner, 101 Ia. 88; 69 N. W. 1142; Manning v. Fitch, 138 Mass. 273; Townsend v. Wharf Co., 117 Mass. 501; Cutting v. Grand Trunk Co., 13 All. (Mass.) 381; Hurd v. Dunsmore, 63 N. H. 171; Griffin v. Colver, 16 N. Y. 489; Devereux v. Buckley, 34 O. S. 16; 32 Am. Rep. 342; Hammer v. Schoenfelder, 47 Wis. 455; 2 N. W. 1129. "When the special circumstances are known to both parties, it is obvious that each may have contracted with reference to them; and that, if such was in fact the case, the party in fault may be held justly to make good to the other

whatever damages he has sustained which were the reasonable and natural consequences of a breach under the circumstances so known and with reference to which the parties acted." Loneragan v. Waldo, 179 Mass. 135, 139; 88 Am. St. Rep. 365; 60 N. E. 479.

³ McKinnon v. McEwan, 48 Mich. 106; 42 Am. Rep. 458; 11 N. W. 828; Booth v. Rolling Mill Co., 60 N. Y. 487.

⁴ Loneragan v. Waldo, 179 Mass. 135; 88 Am. St. Rep. 365; 60 N. E. 479.

⁵ Forsyth v. Mann, 68 Vt. 116; 32 L. R. A. 788; 34 Atl. 481.

result of such breach of that particular contract, as the damages which follow in the ordinary course of things are the natural result of breach of a contract which contains no special terms. Damages arising out of such special course of things are therefore to be allowed to the party not in default to compensate him for the loss occasioned by breach.¹ Thus if seed is sold for planting and it is warranted to be of a specified kind and quality and the vendee plants such seed not knowing that it is of inferior quality, the measure of damages is the difference between the value of the crop as it would have been had the seed been as agreed upon and the value of the crop as raised.² A similar rule applies as to fruit trees which were warranted sound and sold to be planted at once in an orchard.³ A agreed to furnish to B such ice as B needed for his ice box in which he kept meat for sale. A did not furnish such ice during a part of the summer, and by reason of such breach and of the fact that B was unable to obtain other ice a quantity of meat spoiled. It was held that A was liable to B for the value of such meat.⁴ A agreed to store perishable goods for B in cold storage, the temperature of the storeroom to be kept below a certain degree. A did not keep the temperature below the degree contracted for and by reason thereof such goods decayed. It was held that A was liable to B for such loss.⁵ If A agreed to furnish a heater for B's greenhouse to maintain a given temperature, A is liable for

¹ *Heilman v. Pruyn*, 122 Mich. 301; 80 Am. St. Rep. 570; 81 N. W. 97; *Reiger v. Worth*, 127 N. C. 230; 80 Am. St. Rep. 798; 52 L. R. A. 362; 37 S. E. 217; *Dunn v. Bushnell*, 63 Neb. 568; 93 Am. St. Rep. 474; 88 N. W. 693; *Sutherland v. Warehouse Co.*, 171 N. Y. 269; 89 Am. St. Rep. 815; 63 N. E. 1100; *Booth v. Rolling Mill Co.*, 60 N. Y. 487; *Trigg v. Clay*, 88 Va. 330; 29 Am. St. Rep. 723; 13 S. E. 434; *Richardson v. Chynoweth*, 26 Wis. 656.

² *Edgar v. Corporation*, 172 Mass. 581; 52 N. E. 1083; *Dunn v. Bush-*

nell, 63 Neb. 568; 93 Am. St. Rep. 474; 88 N. W. 693; *Wolcott v. Mount*, 36 N. J. L. 262; 13 Am. Rep. 438; affirmed, 38 N. J. L. 496; 20 Am. Rep. 425.

³ *Heilman v. Pruyn*, 122 Mich. 301; 80 Am. St. Rep. 570; 81 N. W. 97.

⁴ *Hammer v. Schoenfelder*, 47 Wis. 455; 2 N. W. 1129.

⁵ *Hyde v. Refrigerating Co.*, 144 Mass. 432; 11 N. E. 673; *Sutherland v. Warehouse Co.*, 171 N. Y. 269; 89 Am. St. Rep. 815; 63 N. E. 1100; *Leidy v. Warehouse Co.*, 180 Pa. St. 323; 36 Atl. 851.

damages caused by defective working of such heater, causing damages to B's plants by cold.⁶ The cases in which a special course of things is specifically contracted for, shade off imperceptibly into the class of cases in which the special course of things is known to the party in default but is not specifically contracted for.⁷

§1580. Rule where party in default ignorant of special circumstances.

If the party in default is not advised of a special course of circumstances, he is not liable for the damages which follow breach by reason of such special course.¹ If greater damages than would be indicated by the rules for estimating ordinary damages are in fact sustained, such additional damages cannot be recovered "unless the special circumstances which made it reasonable to expect that the greater damages would naturally ensue were, at the time when the contract was made within the knowledge of both parties."² Thus if there is a delay in furnishing machinery and the vendor does not know the vendee's business, or the interruption of such business caused by such delay, he is not liable for damages by reason of such interruption.³ So no recovery can be had on breach of a contract of sale for loss of profits on a resale if the original vendor did not know of vendee's intention to resell.⁴ The notice to the party whom it is sought to hold must be direct and unequivocal. In a leading case,⁵ it was held that knowledge that the factory of a shipper

⁶ *Kramer v. Messner*, 101 Ia. 88; 69 N. W. 1142.

⁷ See § 1578.

¹ *Swift River Co. v. R. R.*, 169 Mass. 326; 61 Am. St. Rep. 288; 47 N. E. 1015; *Harvey v. R. R.*, 124 Mass. 421; 26 Am. Rep. 673; *Scott v. S. S. Co.*, 106 Mass. 468; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201.

² *Loneragan v. Waldo*, 179 Mass. 135, 139; 88 Am. St. Rep. 365; 60 N. E. 479.

³ *Creamery Package Mfg. Co. v. Creamery Co.*, 120 Ia. 584; 95 N. W. 188; *Puget Sound, etc., Works v. Clemmons*, 32 Wash. 36; 72 Pac. 465.

⁴ *Lynch v. Wright*, 94 Fed. 703; *Denhard v. Hirst*, 111 Ky. 546; 64 S. W. 393; *Pennypacker v. Jones*, 106 Pa. St. 237.

⁵ *Hadley v. Baxendale*, 9 Exch. 341.

was not in operation and that such shipper had forwarded a piece of broken machinery was not sufficient to notify the carrier that the suspension of such factory was due to the carrier's failure to transport such broken machinery; though such suspension was in fact due to such delay, as the broken machinery was to be used as a model in making a duplicate part. So if a lessor does not know that lessee is unable to obtain another house and that in consequence thereof he will be obliged to give up his employment, he is not liable, on breach of a contract to lease a dwelling house, for damages arising out of such loss of employment.⁶ Such notice, however, may be implied from the entire transaction and need not be given by express words. Thus if a carrier knows that goods are intended for market, and that their arrival on time is important to the vendor, he may be held liable for the difference between the market price of such goods if delivered at the time agreed upon and their market price when delivered.⁷

§1581. Special course of things merely probable.

If the party in default knows that a certain course of circumstances is probable, but does not know that such course of circumstances will positively follow he is not liable, if such course of circumstances comes to pass, for the loss which arises by reason thereof.¹ Thus A agreed to sell oil to B to be delivered at a certain place. A knew that it was probable that B would use some means of transportation for such oil, but he was not positively advised of such fact. On breach, A was held liable to B for the difference between the market price and the contract price; but not for expenses incurred by B in hiring oil-cars, nor for B's loss of trade.² So an employer who renounces in advance a contract of employment, by the terms of which the

⁶ *Serfling v. Andrews*, 106 Wis. 78; 81 N. W. 991.

⁷ *Cleveland, etc., Ry. v. Patton*, 203 Ill. 376; 67 N. E. 804; affirming 104 Ill. App. 550; *Cutting v. Ry.*, 13 All. (Mass.) 381; *Sloop v. R. R.*, 93 Mo. App. 605; 67 S. W.

956; *Ward v. R. R.*, 47 N. Y. 29; *Devereux v. Buckley*, 34 O. S. 16; 32 Am. Rep. 342.

¹ *Globe Refining Co. v. Oil Co.*, 190 U. S. 540.

² *Globe Refining Co. v. Oil Co.*, 190 U. S. 540.

employe, in addition to his salary, has the right to buy goods from his employer at wholesale prices, is not liable in damages for the difference between the wholesale and retail price of the goods which such employe would probably have bought.³

§1582. Mental anguish.

The general rule applicable to contracts is that no recovery can be had for mental anguish caused by breach.¹ Wherever the breach is not such as would naturally cause mental anguish, and the special facts by reason of which mental anguish is caused are not known, such damages are refused in accordance with the general principles applicable to damages, and not by reason of any principles peculiar to this form of damage.² Thus if a telegram does not show on its face that its non-delivery will cause mental anguish and such facts are not known, no damages for mental anguish can be recovered.³ No recovery can be had for mental suffering and humiliation arising out of a breach of a contract by a bank to honor a check,⁴ or by a telegraph company to send money.⁵ If, however, the mental anguish follows naturally from the breach, there is a conflict of authority as to whether damages can be allowed therefor. Thus whether injury to feelings can be considered as an item of damage in a suit for a breach of a contract to send and deliver a telegram, the telegram showing its nature upon its face, is a point upon which there is a conflict of authority. Such damages are allowed by some courts⁶ and denied by

³ Harris v. Moss, 112 Ga. 95; 37 S. E. 123.

¹ Wilcox v. Ry., 52 Fed. 264; 17 L. R. A. 804; Western Union Telegraph Co. v. Adams, 28 Ind. App. 420; 63 N. E. 125; Gatzow v. Buening, 106 Wis. 1; 80 Am. St. Rep. 17; 49 L. R. A. 475; 81 N. W. 1003.

² Sparkman v. Telegraph Co., 130 N. C. 447; 41 S. E. 881.

³ Sparkman v. Telegraph Co., 130 N. C. 447; 41 S. E. 881.

⁴ American National Bank v. Morey, — Ky. —; 58 L. R. A. 956; 69 S. W. 759.

⁵ Robinson v. Telegraph Co. (Ky.), 57 L. R. A. 611; 68 S. W. 656.

⁶ Western Union Telegraph Co. v. Crocker, 135 Ala. 492; 59 L. R. A. 398; 33 So. 45; Chapman v. Telegraph Co., 90 Ky. 265; 13 S. W. 880; Graham v. Telegraph Co., 109 La. 1069; 34 So. 91; Western Union Telegraph Co. v. Church (Neb.), 57 L. R. A. 905; 90 N. W. 878; Mead-

others.⁷ In an action for breach of a contract to marry, damages may be allowed for mental suffering.⁸ The foregoing examples, while based on contracts, are practically treated as torts. Recovery has also been allowed in breach of a contract to furnish a trousseau, for mortification and humiliation.⁹ Damages for mental anguish are also allowed for breach of contract causing delay in the transportation of the body of a near relative,¹⁰ or for breach of contract by an undertaker who, after agreeing with the parents of a deceased child to place its body in a vault, negligently sends it to another state.¹¹ On the other hand, it is held that in breach of a contract to furnish a hearse, no recovery can be had for injury to the feelings of near relatives, even though it is known that no other hearse can be obtained.¹²

§1583. Duty of injured party to mitigate damages.

It is the duty of the party not in default to use such means as a reasonable and prudent man would use to mitigate damages.¹ On the one hand, the party not in default cannot recover

ows v. Telegraph Co., 132 N. C. 40; 43 S. E. 512; Bright v. Telegraph Co., 132 N. C. 317; 43 S. E. 841; Cashion v. Telegraph Co., 123 N. C. 267; 31 S. E. 493; Marsh v. Telegraph Co., 65 S. C. 430; 43 S. E. 953; Wadsworth v. Telegraph Co., 86 Tenn. 695; 6 Am. St. Rep. 864; 8 S. W. 574; Western Union Telegraph Co. v. Wilson, — Tex. —; 75 S. W. 482.

⁷ Russell v. Telegraph Co., 3 Dak. 315; Chapman v. Telegraph Co., 88 Ga. 763; 30 Am. St. Rep. 183; 17 L. R. A. 430; 15 S. E. 901; Reese v. Telegraph Co., 123 Ind. 294; 7 L. R. A. 583; 24 N. E. 163; Western Union Telegraph Co. v. Adams, 28 Ind. App. 420; 63 N. E. 125; West v. Telegraph Co., 39 Kan. 93; 7 Am. St. Rep. 530; 17 Pac. 807; Western Union Telegraph Co. v. Rogers, 68 Miss. 748; 24 Am. St.

Rep. 300; 13 L. R. A. 859; 9 So. 823; Morton v. Telegraph Co., 53 O. S. 431; 53 Am. St. Rep. 648; 32 L. R. A. 735; 41 N. E. 689.

⁸ Reed v. Clark, 47 Cal. 194; Robinson v. Craver, 88 Ia. 381; 55 N. W. 492; Grubbs v. Pence (Ky.), 73 S. W. 785; rehearing denied, 74 S. W. 709; Rutter v. Collins, 103 Mich. 143; 61 N. W. 267.

⁹ Lewis v. Holmes, 109 La. 1030; 61 L. R. A. 274; 34 So. 66.

¹⁰ Hale v. Bonner, 82 Tex. 33; 27 Am. St. Rep. 850; 14 L. R. A. 336; 17 S. W. 605.

¹¹ Renihan v. Wright, 125 Ind. 536; 21 Am. St. Rep. 249; 9 L. R. A. 514; 25 N. E. 822.

¹² Gatzow v. Buening, 106 Wis. 1; 80 Am. St. Rep. 17; 49 L. R. A. 475; 81 N. W. 1003.

¹ Roehm v. Horst, 178 U. S. 1; Watts v. Camors, 115 U. S. 353;

for damages which follow breach, but which might have been prevented by such means.² Thus A sold to B pork in leaky barrels. The defects were discovered by B before any harm had been done to the pork. B could recover as damages only the cost of repacking the pork in tight barrels.³ In case of breach before performance is complete, amounting to a discharge, the party not in default cannot insist on completing performance, increasing damages, and recovering the full contract price. Thus A made a contract for advertising its goods in B's cars for twelve months. At the end of two months and seventeen days A ordered such advertising discontinued. B continued to perform the contract. It was held that B could not recover the contract price for the entire term; but only the contract price for two months and seventeen days plus damages caused by such breach.⁴ If the injured party fails to mitigate damages as he should, he is not precluded from all recovery,⁵ though he cannot recover for the increased damages due to his own negligence. The question whether under all the circumstances the party not in default did what he should to mitigate damages is a question of fact.⁶ On the other hand, in mitigating such damages, the party not in default is bound merely to use reasonable care. He is not an insurer of results.⁷ If his reasonable and prudent care does not mitigate the damages he may nevertheless recover the cost of such attempted mitigation. Thus on breach of a warranty of plastering, the injured party attempted in good faith and in a reasonable manner to remedy defects by patching. This attempt failed. It was held

Jordan v. Patterson, 67 Conn. 473; 35 Atl. 521; Hodges v. Fries, 34 Fla. 63; 15 So. 682; Sherman Center Town Co. v. Leonard, 46 Kan. 354; 26 Am. St. Rep. 101; 26 Pac. 717; Talley v. Courter, 93 Mich. 473; 53 N. W. 621; Uhlig v. Barnum, 43 Neb. 584; 61 N. W. 749; Howard v. Daly, 61 N. Y. 362; 19 Am. Rep. 285; Colvin v. Oil Co., 66 S. C. 61; 44 S. E. 380.

² Colvin v. Oil Co., 66 S. C. 61; 44 S. E. 380.

³ Hitchcock v. Hunt, 28 Conn. 343.

⁴ Ward v. Food Co., 119 Wis. 12; 96 N. W. 388.

⁵ Hurxthal v. Lumber Co., 53 W. Va. 87; 97 Am. St. Rep. 954; 44 S. E. 520.

⁶ Lonergan v. Waldo, 179 Mass. 135; 88 Am. St. Rep. 365; 60 N. E. 479.

⁷ The Thomas P. Sheldon, 113 Fed. 779.

that he could recover as part of his damages the cost of such unsuccessful attempt.⁸ The rule as to the duty to mitigate damages and the effect of such mitigation applies only to the immediate consequences of performance. After the loss is fixed, the skill or good luck of the party not in default may result in his avoiding ultimate financial loss in the transaction. This is, however, of no consequence in estimating damages. He is entitled to the benefit of the contract which has been broken and to the result of his own skill in avoiding ultimate loss; and such results cannot enure to the party in default. Thus A agreed to cure certain fruit for B, but performed his contract in a negligent manner. A is liable to B in damages, even though B finally succeeded in selling such fruit at prices usually obtained for good fruit.⁹ So in breach of a contract to transport grain the liability of the carrier is not affected by the fact that the shipper made a very favorable settlement with persons to whom he had agreed to sell such grain.¹⁰ So where a telegraph company delays a message and thereby prevents a sale of corn at a price above the market price, the company is liable for the difference between the price at which the corn would have sold and the market price, even if the vendor subsequently sold such corn at a higher price.¹¹ It is therefore the duty of a discharged employe to seek other employment; of the owner of a vessel whose charterer refuses to use and pay for it to seek another charterer;¹² of a lessee whose lessor has refused to put him in possession of the leased premises to lease others;¹³ and in such cases the amount which the injured party thus received from others, or the amount which he might have received by the use of reasonable care and diligence, must be deducted from the amount of damages. If the vendor fails to deliver goods agreed upon, and the vendee can purchase similar goods in the market

⁸ Nye, etc., Co. v. Snyder, 56 Neb. 754; 77 N. W. 118.

⁹ E. E. Thomas Fruit Co. v. Start, 107 Cal. 206; 40 Pac. 336.

¹⁰ Cobb v. Ry., 38 Ia. 601.

¹¹ Western Union Telegraph Co.

v. Grain Co., — Neb. —; 63 L. R. A. 803; 97 N. W. 305.

¹² Watts v. Camors, 115 U. S. 353.

¹³ Hodges v. Fries, 34 Fla. 63; 15 So. 682.

he cannot increase his damages by refusing to make such purchase.¹⁴

§1584. To what date damages may be recovered.

The question of the date to which damages are to be computed is often material. If the breach sued for is such as to discharge the entire contract, all damages caused by such breach, including those which will arise with reasonable certainty after the trial, must be recovered in that action.¹ There is some authority for a contrary view.² If the party in default voluntarily sues for less than the amount to which he is entitled, a judgment for such less amount will bar further recovery. On the other hand, the breach may be such as to give rise to an action for damages, but to leave the contract valid and subsisting. Damages can be recovered, according to some authorities, down to the date of the writ, or the time of the commencement of the action.³ According to other authorities damages may be recovered in such cases down to the time of trial.⁴ Whichever theory applies, however, damages can not be recovered for future possible breaches if the contract is still subsisting. At any rate, where suit has been brought for breach of a contract of employment, and while suit is brought before the term has ended, it is not tried till after the term has ended, full damages may be allowed.⁵

¹⁴ *Parsons v. Sutton*, 66 N. Y. 92.

¹ *Roehm v. Horst*, 178 U. S. 1; *Shoemaker v. Acker*, 116 Cal. 239; 48 Pac. 62; *Standard Oil Co. v. Denton* (Ky.), 70 S. W. 282; *Drummond v. Crane*, 159 Mass. 577; 38 Am. St. Rep. 460; 23 L. R. A. 707; 65 N. E. 90; *Conlon v. McGraw*, 66 Mich. 194; 33 N. W. 388; *Rathbone, etc., Co. v. Wheelihan*, 82 Minn. 30; 84 N. W. 638; *James v. Allen County*, 44 O. S. 226; 58 Am. Rep. 821; 6 N. E. 246; *Remelee v.*

Hall, 31 Vt. 582; 76 Am. Dec. 140; *Rhoades v. Ry.*, 49 W. Va. 494; 87 Am. St. Rep. 826; 55 L. R. A. 170; 39 S. E. 209.

² Contract of employment. *Harris v. Moss*, 112 Ga. 95; 37 S. E. 123.

³ *Parker v. Russell*, 133 Mass. 74.

⁴ *Bryson v. McCone*, 121 Cal. 153; 53 Pac. 637.

⁵ *Howay v. Going-Northrup Co.*, 24 Wash. 88; 85 Am. St. Rep. 942; 64 Pac. 135.

II. SPECIFIC ILLUSTRATIONS.

§1585. Contract of employment.

If a contract for services is broken by the employer the measure of damages depends upon the terms of the compensation. If a certain rate of compensation is to be paid by the day, month or year, the measure of damages is the contract price for the entire term less what the employe could earn in that locality at a similar employment if he had exercised due care to obtain such other employment.¹ If his expenses while on the road were to have been paid by his employer, they may also be considered as an item of damage to the employe.² If the employe is to be paid by the piece, or a job, the measure of the damages is the contract price less what it would cost to complete the contract.³ This rule gives the employe the benefit of the contract in the form of the profits that would accrue from performance, but does not allow him for the loss of his time as such.⁴ If a contract of employment is broken by the employe, the measure of damages is the reasonable value of such services in that locality, less the contract price.⁵ Where a contract to deliver lumber at a yard was broken by piling some elsewhere the measure of recovery was held to be the difference between the contract price and the cost of the work

¹ *Pierce v. Ry.*, 173 U. S. 1; *Fuller v. Little*, 61 Ill. 22; *Hamilton v. Love*, 152 Ind. 641; 71 Am. St. Rep. 384; 53 N. E. 181; 54 N. E. 437; *Worthington v. Park Imp. Co.*, 100 Ia. 39; 69 N. W. 258; *Baltimore Base Ball, etc., Co. v. Pickett*, 78 Md. 375; 44 Am. St. Rep. 304; 22 L. R. A. 690; 28 Atl. 279; *Bennett v. Morton*, 46 Minn. 113; 48 N. W. 678; *Lee v. Hampton*, 79 Miss. 321; 30 So. 721; *Kelly v. Wheel Co.*, 62 O. S. 598; 57 N. E. 984; *East Tennessee, etc., Ry. v. Staub*, 7 Lea (Tenn.) 397; *Howay v. Going-Northrup Co.*, 24 Wash. 88; 85 Am.

St. Rep. 942; 64 Pac. 135; *Rhoades v. Ry.*, 49 W. Va. 494; 87 Am. St. Rep. 826; 55 L. R. A. 170; 39 S. E. 209; *Babcock v. Mfg. Co.*, 93 Wis. 124; 67 N. E. 33.

² *Estes v. Shoe Co.*, 155 Mo. 577; 56 S. W. 316.

³ *Reed v. Ry. (Ky.)*, 75 S. W. 200; *Jewett v. Wilmot*, 51 Neb. 700; 71 N. W. 775.

⁴ *Jewett v. Wilmot*, 51 Neb. 700; 71 N. W. 775.

⁵ *Hartman v. Rogers*, 69 Cal. 643; 11 Pac. 581; *Truitt v. Fahey*, 3 Penn. (Del.) 573; 52 Atl. 339.

done; and not the cost of moving the rest of the lumber.⁶ The measure of damages for delay in setting up a heater is the cost of completing it, and not the value of the personal services of the vendee.⁷ If the contract is ended by mutual consent, the amount of recovery for work and labor is such proportion of the contract price as the amount of work done is to the entire amount.⁸

§1586. Contract not to compete.

For breach of a contract not to compete in business the measure of damages is the amount of profits which the party not in default has lost by reason of such breach,¹ and not the amount of profits made by the party in default by reason of such breach.²

§1587. Building contract.

If a contract to construct a building is broken by reason of the contractor's failure to complete it, the measure of damages is the cost of completing it less the contract price.¹ If the owner prevents the contractor from completing the building, the measure of damages is the contract price less the cost of completing the building.² If the contractor delays performance beyond the time agreed upon, the measure of damages is the rental value of the property for the time of such delay.³ If it has no rental value, the measure of damages is the value of the loss of its possession for the time of the delay, as a thing of use.⁴ If a building contract is performed substantially but

⁶ Carroll v. Caine, 27 Wash. 402; 67 Pac. 993.

⁷ Hickok v. Adams Co., — S. D. —; 99 N. W. 77.

⁸ Connolly v. Sullivan, 173 Mass, 1; 53 N. E. 143.

¹ Wittenberg v. Mollyneaux, 60 Neb. 583; 83 N. W. 842; Dose v. Tooze, 37 Or. 13; 60 Pac. 380.

² Dose v. Tooze, 37 Or. 13; 60 Pac. 380.

¹ Davis v. Ford, 81 Md. 333; 33 Atl. 280.

² Wilson v. Borden, — N. J. —; 54 Atl. 815; Jenkins v. Ry., 58 S. C. 373; 36 S. E. 703.

³ Cannon v. Hunt, 113 Ga. 501; 38 S. E. 983; Eaton v. Gladwell, 121 Mich. 444; 80 N. W. 292.

⁴ Lee v. Normal School Co., 1 Neb. (Unofficial) 681; 96 N. W. 65.

not literally, the measure of damages is the cost of remedying such defects as do not necessitate an unreasonable expenditure.⁵

§1588. Contract for sale of realty.

If an executory contract for the sale of realty is broken by the vendor, the measure of damages is the actual value of the realty, less the contract price.¹ It has been said, however, that if the breach is due to a failure of title, the contract being executory only, nominal damages should be given.² In case of breach by the vendee it has been held that the vendor may, if he pleases, treat the equitable interest as being in the vendee and recover the entire contract price.³

§1589. Executory contract for sale of personalty.—Breach by vendor.

If a contract for the sale of personalty, executory on the part of the vendor, is broken by the vendor, the measure of damages is the market price of such property less the contract price.¹ The market price for this purpose must be determined as of the time and place of the delivery agreed upon.² If

⁵ Ashland, etc., Co. v. Shores, 105 Wis. 122; 81 N. W. 136.

¹ Cornell v. Rodabaugh, 117 Ia. 287; 94 Am. St. Rep. 298; 90 N. W. 599; Yokom v. McBride, 56 Ia. 139; 8 N. W. 795; Kirkpatrick v. Downing, 58 Mo. 32; 17 Am. Rep. 678; Muenchow v. Roberts, 77 Wis. 520; 46 N. W. 802; Hall v. Delaplaine, 5 Wis. 206; 68 Am. Dec. 57.

² Gerbert v. Trustees, 59 N. J. L. 160; 59 Am. St. Rep. 578; 35 Atl. 1121.

³ Ehrich v. Durkee, — Colo. App. —; 72 Pac. 814; Gray v. Meek, 199 Ill. 136; 64 N. E. 1020; affirming 101 Ill. App. 463.

¹ Crug v. Gorham, 74 Conn. 541; 51 Atl. 519; Rahm v. Deig, 121 Ind. 283; 23 N. E. 141; Welch v. Ur-

bany, 112 Ia. 531; 84 N. W. 497; Asher v. Stacy (Ky.), 65 S. W. 603; Williams v. Bienvenue, 109 La. 1023; 34 So. 63; Bartlett v. Blanchard, 13 Gray (Mass.) 429; Cox v. Power Co., 87 Minn. 56; 91 N. W. 265; Stone v. Mfg. Co., 65 N. J. L. 20; 46 Atl. 696; Talbot v. Boyd, 11 N. D. 81; 88 N. W. 1026; Smith v. Lime Co., 57 O. S. 518; 49 N. E. 695; Kinports v. Breon, 193 Pa. St. 309; 44 Atl. 436; Harris v. Rodgers, 6 Heisk. (Tenn.) 626.

² Michael v. Hart (1902), 1 K. B. 482; Cummings v. Dudley, 60 Cal. 383; 44 Am. Rep. 58; Murray v. Doud, 167 Ill. 368; 59 Am. St. Rep. 297; 47 N. E. 717; Fink v. Tatman, 36 Ind. 259; 10 Am. Rep. 19; Cole v. Ross, 9 B. Mon. (Ky.) 393; 50

delivery has been postponed by mutual consent, the time fixed by the last postponement is the time at which damages should be estimated.³ If there is no market at the place of delivery but there is one within a reasonable distance, the market price at such market with the cost of transportation must be taken as the measure of damages.⁴ The value of a note whose sale is contracted for is its selling price and not its face, within the meaning of this rule.⁵ If a higher price must be paid in open market for buying on short notice, this must be considered in determining damages.⁶ If a contract to sell at private sale is broken by a sale at auction, the measure of damages is the difference between the price obtained and the price that would have been obtained by a sale under the contract.⁷ Ordinarily, the loss of profits which the vendee would have made on a contemplated resale cannot be recovered.⁸ This rule is said to exist where the vendor does not know of such intended resale.⁹ If, however, the supply of the article contracted for is limited so that it cannot be bought in open market and has no market price, a different rule must apply. The cost of getting the article less the contract price has been said to be the measure of damages.¹⁰ If failure to get such article stops the vendee's business it has been said that he may recover the profits which he otherwise would have made.¹¹ So the profits of a possible resale have been allowed in such cases.¹²

Am. Dec. 517; *McGrath v. Gegner*, 77 Md. 331; 39 Am. St. Rep. 415; 26 Atl. 502; *Austrian v. Springer*, 94 Mich. 343; 34 Am. St. Rep. 350; 54 N. W. 50; *Cahen v. Platt*, 69 N. Y. 348; 25 Am. Rep. 203.

³ *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899.

⁴ *Coxe v. Power Co.*, 87 Minn. 56; 91 N. W. 265.

⁵ *Kory v. Layman*, 108 La. 247; 32 So. 441.

⁶ *Christopher, etc., Co. v. Yeager*, 202 Ill. 486; 67 N. E. 166; affirming 105 Ill. App. 126.

⁷ *Paxton v. Vadbouker*, 1 Neb. Unofficial 776; 96 N. W. 378.

⁸ *Crug v. Gorham*, 74 Conn. 541; 51 Atl. 519; *W. K. Henderson Lumber Co. v. Stilwell*, 130 Mich. 124; 89 N. W. 718.

⁹ *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 165; 53 Atl. 1110.

¹⁰ *McFadden v. Henderson*, 128 Ala. 221; 29 So. 640.

¹¹ *Border City, etc., Co. v. Adams*, 69 Ark. 219; 62 S. W. 591.

¹² *Tradewater Coal Co. v. Let (Ky.)*, 68 S. W. 400.

§1590. Breach by vendee.

If such a contract is broken by the vendee, the measure of damages is the contract price less the market price.¹ Thus in case of a breach of a contract to buy cattle the vendor cannot keep them for six months at the vendee's expense.² The market price at the time and place of delivery is to be taken as a standard.³ If by the contract the property is to be delivered "during" a certain month,⁴ or if it is to be delivered as ordered during the year, any arrears in the total amount to be delivered on the last day,⁵ the market price on such last day is to be taken as the standard. If a fair public sale is made by the vendor after advertisement, the selling price is to be taken as the market price,⁶ even if the vendor buys the property in himself.⁷ Thus in case of a breach of a contract to buy a note and mortgage, the measure of damages is the amount of the deficiency left after foreclosure.⁸ The right to fix the price by a resale is especially clear if the property is of such sort as depreciates rapidly.⁹

¹ *Clews v. Jamieson*, 182 U. S. 461; *Peck-Hammond Co. v. Heifner*, 136 Ala. 473; 96 Am. St. Rep. 36; 33 So. 807; *Scribner v. Schenkel*, 128 Cal. 250; 60 Pac. 860; *Kincaid v. Price*, — Colo. App. —; 70 Pac. 153; *Wallingford v. Aitkins* (Ky.), 72 S. W. 794; *Schaaf v. Hamilton* (Neb.), 89 N. W. 614; *Moore v. Potter*, 155 N. Y. 481; 63 Am. St. Rep. 692; 50 N. E. 271; *Cullen v. Bimm*, 37 O. S. 236; *Jones v. Jennings*, 168 Pa. St. 493; 32 Atl. 51; *Saveland v. Ry.*, 118 Wis. 267; 95 N. W. 130.

² *First National Bank v. Ragsdale*, 171 Mo. 168; 71 S. W. 178.

³ *Hamilton v. Finnegan*, 117 Ia. 623; 91 N. W. 1039; *Pratt v. Freeman & Sons Mfg. Co.*, 115 Wis. 648; 92 N. W. 368; *Gehl v. Produce*

Co., 116 Wis. 263; 93 N. W. 26.

⁴ *J. P. Gentry Co. v. Margolius*, 110 Tenn. 669; 75 S. W. 959.

⁵ *Duluth Furnace Co. v. Mining Co.*, 117 Fed. 138; 55 C. C. A. 154.

⁶ *Ackerman v. Rubens*, 167 N. Y. 405; 82 Am. St. Rep. 728; 53 L. R. A. 867; 60 N. E. 750; *American, etc., Co. v. Chalkley*, 101 Va. 458; 44 S. E. 705; *Gehl v. Produce Co.*, 116 Wis. 263; 93 N. W. 26.

⁷ *Ackerman v. Rubens*, 167 N. Y. 405; 82 Am. St. Rep. 728; 53 L. R. A. 867; 60 N. E. 750.

⁸ *Loeb v. Stern*, 198 Ill. 371; 64 N. E. 1043; affirming 99 Ill. App. 637.

⁹ *Puritan Coke Co. v. Clark*, 204 Pa. St. 556; 54 Atl. 350.

§1591. Contract to manufacture.

If a contract to manufacture and deliver goods is broken by the manufacturer, the measure of damages is the market price of such goods, minus the contract price.¹ If such a contract is broken by the vendee, the measure of damages is the contract price, less the cost of manufacturing.² Thus A agreed to get logs, cut them into lumber, and deliver the lumber to B. After A had obtained the logs and before he had cut them, B repudiated the contract. A could recover the profit that he would have made had there been no breach.³ If the vendee manufactures the article himself the measure of damages is the contract price less the cost of manufacturing the article, allowing nothing to the vendee for a manufacturer's profit.⁴

§1592. Executed contract for sale of personalty.

If a contract of sale has been performed by the vendor, and title has passed to the vendee, and the vendee refuses to pay, the measure of damages is the contract price.¹ If the title has passed and there is a breach of a warranty, the measure of damages is the value that the property would have had, if it had been as warranted, and its value as it actually is.² In

¹ *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899.

² *Cort v. Ry.*, 17 Q. B. 127; *Hinckley v. Steel Co.*, 121 U. S. 264; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242; 41 Pac. 1020; *Hale v. Trout*, 35 Cal. 229; *Kimball v. Deere*, 108 Ia. 676; 77 N. W. 1041; *Collins v. Delaporte*, 115 Mass. 159; *Hosmer v. Wilson*, 7 Mich. 294; 74 Am. Dec. 716; *Crescent Mfg. Co. v. Mfg. Co.*, 100 Mo. 325; 13 S. W. 503; *Black River Lumber Co. v. Warner*, 93 Mo. 374; 6 S. W. 210; *Muskegon Curtain-Roll Co. v. Mfg. Co.*, 135 Pa. 132; 19 Atl. 1008; *Tufts v. Lawrence*, 77 Tex. 526; 14 S. W. 165; *Walsh v. Myers*, 92 Wis.

397; 66 N. W. 250; *Tufts v. Weinfeld*, 88 Wis. 647; 60 N. W. 992; *Cameron v. White*, 74 Wis. 425; 5 L. R. A. 493; 43 N. W. 155.

³ *Cameron v. White*, 74 Wis. 425; 5 L. R. A. 493; 43 N. W. 155.

⁴ *Pittsburg Sheet Mfg. Co. v. Steel Co.*, 201 Pa. St. 150; 50 Atl. 935.

¹ *Atlantic Phosphate Co. v. Graflin*, 114 U. S. 492; *Lassing v. James*, 107 Cal. 348; 40 Pac. 534; *Austin Mfg. Co. v. Decker*, 109 Ia. 277; 80 N. W. 312; *Obery v. Lander*, 179 Mass. 125; 60 N. E. 378; *Brigham v. Hibbard*, 28 Or. 386; 43 Pac. 383; *Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547; 91 N. W. 330.

² *Cleveland Linseed Oil Co. v. Buchanan*, 120 Fed. 906; 57 C. C. A.

some cases, however, this rule cannot be applied as the value of the article as it is, or as represented, may be impossible to ascertain. Thus in a breach of warranty that a judgment sold by the warrantor was valid, it has been held that the measure of damages is the amount paid therefor with interest.³ In such a case as this, there is moreover a total failure of consideration. If A sells personal property to B with warranty of title and B sells to C, from whom it is taken under legal process by the real owner X, A is not liable to B for more than the price paid by B to A. A is not liable for the amount of the judgment recovered by C from B, including C's attorney fees in resisting X's action.⁴ It has been held that in contracts for the sale of machinery which does not conform to the warranty, the measure of damages is the cost of making such machinery conform to the warranty,⁵ especially if the vendor has requested the vendee to put it in condition.⁶

§1593. Contract to pay money.

If a contract to pay money is broken, the measure of damages is the interest upon such amount due and payable.¹ For breach of a contract to send money by telegraph, the measure of damages is the interest upon such amount for such delay, and actual expense made necessary by such breach.² In the

498; *Landman v. Bloomer*, 117 Ala. 312; 23 So. 75; *Berry v. Shannon*, 98 Ga. 459; 58 Am. St. Rep. 313; 25 S. E. 514; *E. A. Moore Furniture Co. v. Sloane*, 166 Ill. 457; 46 N. E. 1128; *Alpha Checkrower Co. v. Bradley*, 105 Ia. 537; 75 N. W. 369; *Burnham v. Meredith* (Neb.), 91 N. W. 553; *Dunn v. Bushnell*, 63 Neb. 568; 93 Am. St. Rep. 474; 88 N. W. 693; *Dean Pump Works v. Iron Works*, 40 Or. 83; 66 Pac. 605; *Hermon v. Silver*, 15 S. D. 476; 90 N. W. 141; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286; 49 L. R. A. 859; 82 N. W. 154.

³ *Duecker v. Goeres*, 104 Wis. 29; 80 N. W. 91.

⁴ *Smith v. Williams*, 117 Ga. 782; 97 Am. St. Rep. 220; 45 S. E. 394.

⁵ *Bixby v. Normal School Association* (Ia.), 78 N. W. 234; *North Bergen Board of Education v. Jaeger*, 67 N. J. L. 39; 50 Atl. 583.

⁶ *Aultman Co. v. McDonough*, 110 Wis. 263; 85 N. W. 980.

¹ *Spalding v. Mason*, 161 U. S. 375; *Curtis v. Innerarity*, 6 How. (U. S.) 146.

² *Robinson v. Telegraph Co.* (Ky.), 57 L. R. A. 611; 68 S. W. 656.

absence of special circumstances, the measure of damages in case of breach of a contract to make a loan is the difference between the rate of interest which the borrower actually had to pay and the rate of interest which he was to pay under the contract.³

§1594. Contract concerning securities.

If a contract to collect¹ or deliver a note,² or procure an assignment of stock³ is broken, the measure of damages is *prima facie* the par value of such note or security.

§1595. Other illustrations of measure of damages.

For breach of a contract to make an improvement which will increase the value of certain realty, such improvement not being made upon the realty, the measure of damages is said by some courts to be a difference between the value of such realty on the day when such improvements should have been completed and its value upon that day had the improvement been completed as contracted for.¹ If a contract to levy an assessment is broken, the *prima facie* measure of ordinary damages is the amount which would have been realized from such assessment.² On a breach of a contract for support for life by the party to furnish such support, the measure of damages is the value of such support for the life of the person to be supported.³ On breach of a contract by a carrier to land

³ New York Life Ins. Co. v. Pope (Ky.), 68 S. W. 851; McGee v. Wineholt, 23 Wash. 748; 63 Pac. 571.

¹ Ft. Dearborn National Bank v. Bank, 87 Minn. 81; 91 N. W. 257.

² Deering v. Johnson, 86 Minn. 172; 90 N. W. 363.

³ First National Bank v. Park, 117 Ia. 552; 91 N. W. 826.

¹ Blagen v. Thompson, 23 Or. 239; 18 L. R. A. 315; 31 Pac. 647; Belt v. Water-Power Co., 24 Wash. 387;

64 Pac. 525. In Hudson v. Archer, 9 S. D. 240; 68 N. W. 541, damages caused by a failure to operate a mill in a given town for a specified time were held too remote to allow recovery by one who had paid money to induce such mill to be located there.

² Assessment by beneficial society. Lawler v. Murphy, 58 Conn. 294; 8 L. R. A. 113; 20 Atl. 457.

³ Paro v. St. Martin, 180 Mass. 29; 61 N. E. 268.

passengers at a certain point, where the carrier lands them elsewhere, the measure of damages is the loss of time, including that of the plaintiff and his employes who were landed with him, the extra cost of living and the expense of getting to their destination.⁴

⁴ Bullock v. S. S. Co., 30 Wash. 448; 70 Pac. 1106. (No other elements of damage being shown.)

CHAPTER LXXIV.

QUASI CONTRACTUAL RIGHT OF RECOVERY ON DISCHARGE.

§1596. Nature and theory of right.

The right of a party to a contract to recover a reasonable compensation for what he has done in performance of a contract remains for investigation. The theory underlying this right of recovery is not that the contract is to be enforced, but that compensation is to be made by a party who has received a benefit to a party who has rendered it, where such benefit was not intended by the parties to be gratuitous. This right of recovery is often referred to the theory of implied contract, and is put upon the ground that the party who has received the benefit impliedly agrees to make compensation therefor to the party who renders it. The fictitious character of this implied promise is nowhere clearer than in cases like this, because the party who renders the service, and the one who receives it, alike expect at the time that the express contract entered into between them will be performed; and therefore have no real understanding, express or implied, for paying a reasonable compensation without reference to the terms of such contract. If the fictitious character of the implied contract is clearly recognized, as when such rights are classed as constructive contracts, or quasi contractual rights, no harm can result from the use of such terms. Such a right, however, must not be confused with genuine implied contract. Rights of recovery, such as those under discussion, are grouped with implied contract for historical reasons. At Common Law the only form of action appropriate to such state of facts, was the action of *assumpsit*, and as no action could be maintained upon the special contract under such theory, it followed that the common counts

in assumpsit were used wherever such action was brought. In order to bring an action in assumpsit, it was necessary to allege a promise. Accordingly, the theory of the implied or fictitious promise arose. From its inception, therefore, it was not a theory of substantive law, but merely a theory of pleading. The exercise of this right is, as we have seen,¹ the result of the election between inconsistent remedies arising out of contract. Accordingly, an action of this sort operates as a waiver of any claim for damages that might have existed.² Therefore the plaintiff cannot, under cover of this sort of action, enforce a claim for damages.³ Thus an action in general assumpsit for work and labor cannot be made the means for recovering damages for a breach of a contract.⁴ If the contract has been broken before the plaintiff has performed in whole or in part, he may recover damages but he cannot maintain an action of this sort. Thus an action for goods sold and delivered will not lie where goods have not been delivered, and where the title thereto has not passed to the defendant against whom the action is maintained.⁵ This action cannot be made a means for recovering damages for the breach of an express contract of sale. A placed a piano in B's house for trial, while B and his family were away, A getting the key to the house from a neighbor. A claimed that B's wife had authorized them to do this. In moving the piano in, B's house was somewhat damaged. B declined to take the piano, and demanded that A pay him the damage done before he surrendered it. It was held that B was not liable for the value of the piano.⁶ The fiction of the implied promise cannot be resorted to where no liability exists by reason of the facts themselves. If what has been done is in performance of the contract, one party thereto cannot increase the liability of the adversary party by this form of action. If goods have been

¹ See § 1569.

² *Harrison v. Hancock*, 2 Neb. Rep. Unofficial 522; 89 N. W. 374.

³ *North v. Mallory*, 94 Md. 305; 51 Atl. 89.

⁴ *North v. Mallory*, 94 Md. 305; 51 Atl. 89.

⁵ *McCormick Harvesting Machine Co. v. Cusack*, 116 Mich. 647; 74 N. W. 1005.

⁶ *Grinnell v. Anderson*, 122 Mich. 533; 81 N. W. 329.

sold under an express contract, which the vendee has performed, the vendor cannot ignore such contract and sue in *assumpsit*. Thus A bought goods of B under a contract by which as A claimed, B was bound to insure such goods during the transit. The goods were not insured, and were lost. Subsequently, A agreed with B's agent, X, to take certain goods in settlement of this claim. The goods were delivered, and A waived his claim. It was held that B could not recover from A for such goods in an action for goods sold and delivered.⁷ So if under the contract a real estate broker may be dismissed at any time before he finds a customer, he cannot on such dismissal maintain a *quantum meruit* for the time that he has spent in trying to find a customer.⁸

§1597. Right of party performing fully to recover.

In determining whether the right to ignore the contract and to sue for a reasonable compensation for services rendered under the contract exists, the first question to determine is whether the party who seeks to maintain such an action has performed the contract on his part. If he has performed the contract fully, and the adversary party has not performed it, the party performing has the right of election. "While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue on the contract or in *indebitatus assumpsit* and rely upon the common counts. In either case the contract will determine the rights of the parties."¹ On the one hand he may maintain an action for breach of the contract and recover damages; on the other hand, he may ignore the contract and maintain an action for the reasonable value of the property furnished or work done by him under the contract. Thus wherever one party to a contract has performed fully, and the

⁷ Wood v. Finson, 89 Me. 459; 36 L. R. A. 77; 61 N. E. 37. Atl. 911.

¹ Dermott v. Jones, 2 Wall. (U.

⁸ Cadigan v. Crabtree, 179 Mass. S.) 1, 9.
474; 88 Am. St. Rep. 397; 55

only thing remaining to be done is the payment of money by the adversary party, the party entitled to receive payment may maintain an action under the common counts in assumpsit.² General assumpsit in counts for money will therefore lie on a note.³ Thus if a vendor of chattels has fully performed his contract, and nothing remains to be done by the vendee except the payment of the purchase price, the vendor may ignore the contract and recover in *quantum meruit*.⁴ So assumpsit will lie to recover the unpaid purchase price of an interest in a partnership.⁵ One who has furnished support under a special contract providing for his compensation by devise of specific property, may in case of breach ignore such contract and recover for work done by him under the contract in *quantum meruit*.⁶ So one who has fully performed a contract for work and labor,⁷ as a building contract,⁸ or a contract to repair a building,⁹ can recover thereon in *quantum meruit*. So assumpsit will lie against a member of an association to recover unpaid dues. Action need not be brought upon the written contract.¹⁰ General assumpsit will lie for contribution by one co-indorser against another, even if an express contract for contribution exists.¹¹ The special contract under which the work was done or property sold may be put in evidence to show the amount

² *Ezell v. King*, 93 Ala. 470; 9 So. 534; *Maas v. Iron Works*, 88 Ala. 323; 6 So. 701; *Union Elevated Ry. v. Nixon*, 199 Ill. 235; 65 N. E. 314; *Reitz v. Seibold*, 92 Ill. App. 147; *Miner v. O'Harrow*, 60 Mich. 91; 26 N. W. 843; *McDermott v. Aid Society*, 24 R. I. 527; 54 Atl. 58.

³ *Brewing Co. v. Hermann*, 187 Ill. 40; 58 N. E. 397; *Wilson v. St. John's Hospital*, 92 Ill. App. 413; *Tebbetts v. Pickering*, 5 Cush. (Mass.) 83; 51 Am. Dec. 48; *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5, 528.

⁴ *Moline, etc., Co. v. Iron Co.*, 83 Fed. 66; 27 C. C. A. 442; *Moore v.*

Mfg. Co., 113 Mo. 98; 20 S. W. 975.

⁵ *Draucker v. Arick*, 161 Pa. St. 357; 29 Atl. 32.

⁶ *Hudson v. Hudson*, 87 Ga. 678; 27 Am. St. Rep. 270; 13 S. E. 583; s. c., 90 Ga. 581; 16 S. E. 349.

⁷ *Stafford v. Sibley*, 106 Ala. 189; 17 So. 324; *Fairfax, etc., Co. v. Chambers*, 75 Md. 604; 23 Atl. 1024.

⁸ *Board of Commissioners Fulton County v. Gibson*, 158 Ind. 471; 63 N. E. 982.

⁹ *Whatley v. Reese*, 128 Ala. 500; 29 So. 606.

¹⁰ *Elm City Club v. Howes*, 92 Me. 211; 42 Atl. 392.

¹¹ *Weeks v. Parsons*, 176 Mass. 570; 58 N. E. 157.

due.¹² Where a party is suing to recover a payment made upon an executory consideration which has failed, his right to recover is not defeated by the fact that the payment was made voluntarily.¹³ In case the adversary party has waived performance of the unperformed terms, the party who has performed all the remaining terms may recover therefor on the common counts.¹⁴ Since the right to sue on the common counts is an election of such remedy and a waiver of the right to sue on the contract, it follows that one who pleads and proves a special contract is precluded by such election from recovering on the common counts.¹⁵ In an action on the common counts, the plaintiff's right of recovery was limited by the amount fixed by the contract.¹⁶

§1598. Right of party excused from complete performance to recover.—Rescission by consent.

If a party who seeks to recover has not performed a contract fully upon his part to be performed, the question then arises whether he is not discharged or excused in any way from complete performance. If he has performed a part of the contract, and some fact has arisen which discharges or excuses him from further performance, he may recover reasonable compensation for what he has done under the contract. Thus if a contract contains a term reserving a right of cancellation to one party, and such right is exercised, the adversary party may recover a reasonable compensation for the work which he has done under the contract.¹ This right exists even if the party seeking recovery has in some way made default under the contract, by reason whereof the adversary party terminated the contract. In such cases the party who has partly per-

¹² *Stafford v. Sibley*, 106 Ala. 189; 17 So. 324.

¹³ Payment for goods. *Glasscock v. Rosengrant*, 55 Ark. 376; 18 S. W. 379. Payment of wages. *Farrell v. Burbank*, 57 Minn. 395; 59 N. W. 485.

¹⁴ *Columbus Safe-Deposit Co. v. Burke*, 88 Fed. 630.

¹⁵ *Burton v. Mfg. Co.*, 132 N. C. 17; 43 S. E. 480. (Though under the Common Law procedure he can join general and special assumpsit.)

¹⁶ *Harrison v. Hancock*, 2 Neb. Rep. Unofficial 522; 89 N. W. 374.

¹ *Lyman v. Lincoln*, 38 Neb. 794; 57 N. W. 531.

formed the contract is entitled to recover a reasonable compensation for what he has done less damages sustained by the adversary party by reason of such default.² If the contract provides for the exercise of the right of cancellation, the party who exercises it in a fair and reasonable manner before he has fully performed the contract, may recover a reasonable compensation for what he has done.³ If the parties rescind the contract by mutual agreement, recovery can be had for work done thereunder before such rescission.⁴ It has been held that in such cases the right of recovery is limited and determined by the contract, and must be a *pro rata* part of the contract price.⁵ So if one party has the express or implied privilege of canceling the contract, he may on so doing recover what he has parted with thereunder to the adversary party in excess of what such adversary party is entitled to retain. Thus B, a guardian, deposited with A money, the funds of B's ward, to be applied by A to the education and care of the ward. B subsequently countermanded such order, and demanded that A pay to him the balance of the funds in his hands. If A refuses to do so, he is liable to B in an action for money had and received.⁶

§1599. Breach by adversary amounting to discharge.

If the adversary party commits such a breach of the contract as amounts to a discharge, the party not in default may treat the contract as ended and may recover for work done thereunder without performing his part fully.¹ Thus under a contract whereby A is to sell a set of forty volumes to B, the title to be in A until all are paid for, if B after twenty-four have been delivered sells them to X, A can treat such sale as

² Von Dorn v. Mengedoht, 41 Neb. 525; 59 N. W. 800.

³ Booth v. Ratcliffe, 107 N. C. 6; 12 S. E. 112.

⁴ Charleston Ice Mfg. Co. v. Joyce, 63 Fed. 916; 11 C. C. A. 496; Atlantic Coast Brewing Co. v. Donnelly, 59 N. J. L. 48; 35 Atl. 647.

⁵ Patnote v. Sanders, 41 Vt. 66; 98 Am. Dec. 564.

⁶ Thweatt v. McCullough, 84 Ala. 517; 5 Am. St. Rep. 391; 4 So. 399.

¹ Danforth v. R. R., 93 Ala. 614; 11 So. 60; Theobald v. Burleigh, 66 N. H. 574; 23 Atl. 367.

a conversion and bring suit against B at once without tendering the remaining eighteen.² So if the adversary party prevents further performance, the party who has partially performed may ignore the contract and sue for a reasonable compensation for services rendered,³ or for property delivered⁴ under such contract. Thus one who has partially performed a building contract,⁵ or a contract of employment,⁶ and is prevented by the adversary party from completing his contract, may recover the reasonable value of his services where the contract makes no apportionment of the price to be paid therefor. So if A employs B's minor son X under contract with B, and requires X to work on Sunday, B may sue for wages without any set-off for damages caused by B's compelling X to abandon A's employment.⁷ By statute it has been provided in some jurisdictions that an employe who quits for good cause shall recover such proportion of compensation agreed upon in case of full performance as the work done by him bears to the work required by the contract.⁸ In a leading case A was to contribute a number of articles to a work which B agreed to publish in installments. After certain installments had been published, B discontinued publication. It was held that A could recover a reasonable compensation for work done.⁹ One

² Putnam v. MacLeod, 23 R. I. 373; 50 Atl. 646.

³ Cass County v. Gibson, 107 Fed. 363; 46 C. C. A. 341; Joyce v. White, 95 Cal. 236; 30 Pac. 524; Beck v. Spice Co., 108 Ga. 242; 33 S. E. 894; Spaulding v. Navigation Co., 5 Ida. 528; 51 Pac. 408; Southern Pacific Co. v. Wells Works, 172 Ill. 9; 49 N. E. 575; affirming, 67 Ill. App. 512; Eakright v. Torrent, 105 Mich. 294, 63 N. W. 293; Mooney v. Iron Co., 82 Mich. 263; 46 N. W. 376; Cadman v. Markle, 76 Mich. 448; 5 L. R. A. 707; 43 N. W. 315; Keyser v. Rehberg, 16 Mont. 331; 41 Pac. 74; Merrill v. Ry., 16 Wend. (N. Y.) 586; 30 Am. Dec. 130; Rioux v. Brick Co., 72 Vt.

148; 47 Atl. 406; Merriman v. Machine Co., 96 Wis. 600; 71 N. W. 1050.

⁴ Hartlove v. Durham, 86 Md. 689; 39 Atl. 617.

⁵ Adams v. Burbank, 103 Cal. 646; 37 Pac. 640; George M. Newhall Engineering Co. v. Daly, 116 Wis. 256; 93 N. W. 12.

⁶ Beck v. Spice Co., 108 Ga. 242; 33 S. E. 894.

⁷ Hunt v. Adams, 81 Me. 356; 3 L. R. A. 608; 17 Atl. 298.

⁸ Such a statute applies to a contract to remove a school-house. Burkhardt v. School Township, 9 S. D. 315; 69 N. W. 16.

⁹ Planché v. Colburn, 8 Bing. 14

who has paid money under a contract may in case of breach by the adversary party, which may amount to a discharge and is so treated, recover such money in *assumpsit*.¹⁰ So if A makes a payment to B under a contract whereby B is to convey certain realty to A by good and indefeasible title, and B is unable to make such title, A can recover from B the money so paid in.¹¹ In Ohio the rule is that if A prevents B from performing, and further performance under the contract would have resulted in loss to B, B, since he could recover only nominal damages, cannot recover the reasonable value of what he has done under the contract,¹² while if further performance would have resulted in gain to B, B may either sue for damages,¹³ or may recover the reasonable value of what he has done under the contract.¹⁴ In most of the cases discussed in this section thus far, compensation in money was provided for by the terms of the contract. Whether such form of compensation is necessary to enable the party not in default to sue for a reasonable compensation is a question upon which there is a conflict of authority. The preponderance of numerical authority is that if compensation is to be made in anything but money, the party not in default can maintain an action for damages only, and cannot waive the contract and sue for a reasonable compensation. Thus A worked for B under an agreement whereby B was to deliver certain property to him when he reached the age of twenty-one. On B's refusal to deliver such property it was held that A could recover damages but that he could not recover the reasonable value of his services.¹⁵ There seems to be no reason for this rule, based on any established principle of law. Some courts have therefore refused to follow it.¹⁶ Thus if A agreed to work on a ranch

¹⁰ *Bacon v. Green*, 36 Fla. 325; 18 So. 870.

¹¹ *Adams v. Henderson*, 168 U. S. 573.

¹² *Doolittle v. McCullough*, 12 O. S. 360.

¹³ See Ch. LXXIII.

¹⁴ *Wellston Coal Co. v. Paper Co.*, 57 O. S. 182; 48 N. E. 888.

¹⁵ *Capps v. Groseclose*, 95 Tenn. 329; 32 S. W. 199. See for similar cases *Anderson v. Rice*, 20 Ala. 239; *Allen v. Jarvis*, 20 Conn. 38; *Cochran v. Tatum*, 3 T. B. Mon. (Ky.) 404; *Bradley v. Levy*, 5 Wis. 400.

¹⁶ *Brown v. Ry.*, 36 Minn. 236; 31 N. W. 941; *Keyser v. Rehberg*, 16 Mont. 331; 41 Pac. 74.

in consideration of his receiving the products of the ranch above a specified amount, he may recover a reasonable compensation for his labor if discharged without cause.¹⁷ The right of the party not in default to recover a reasonable compensation on breach by the other seems to be denied by some authorities where the compensation was to be made in money, but the amount was contingent upon the happening of future events. A did literary work under an alleged contract that B should publish it and divide the profits with A. It was held that if B broke such contract A could recover only damages and not the value of his labor.¹⁸ Other courts allow recovery of a reasonable compensation. Thus if a contract of employment to make sales upon commission,¹⁹ or to organize a corporation,²⁰ is broken by the discharge of the employe without cause, he may recover a reasonable compensation for the work already done.

§1600. Right of recovery in case of discharge by subsequent impossibility.

Recovery can be had in *quantum meruit* where complete performance is prevented by subsequent impossibility.¹ If a contract for personal services is discharged by the sickness or death of the party who is to render such services, he or his personal representatives are entitled to recover a reasonable compensation for the services rendered by him.² If a contract

¹⁷ Keyser v. Rehberg, 16 Mont. 331; 41 Pac. 74.

¹⁸ Keyser's Appeal, 124 Pa. St. 80; 2 L. R. A. 159; 16 Atl. 577.

¹⁹ Merriman v. Machine Co., 96 Wis. 600; 71 N. W. 1050.

²⁰ Cadman v. Markle, 76 Mich. 448; 5 L. R. A. 707; 43 N. W. 315.

¹ Greene v. Linton, 7 Port. (Ala.) 133; 31 Am. Dec. 707; Coe v. Smith, 4 Ind. 79; 58 Am. Dec. 618; Butterfield v. Byron, 153 Mass. 517; 25 Am. St. Rep. 654; 12 L. R. A. 571; 27 N. E. 667; Wolfe v. Howes,

20 N. Y. 197; 75 Am. Dec. 388; Parker v. Macomber, 17 R. I. 674; 16 L. R. A. 858; 24 Atl. 464; McClellan v. Harris, 7 S. D. 447; 64 N. W. 522; Hollis v. Chapman, 36 Tex. 1. What amounts to discharge by subsequent impossibility is discussed elsewhere. See Ch. LXV.

² Chandler v. Grieves, 2 H. Bl. 606; Ryan v. Dayton, 25 Conn. 188; 65 Am. Dec. 560; Leopold v. Salkey, 89 Ill. 412; 31 Am. Rep. 93; Coe v. Smith, 4 Ind. 79; 58 Am. Dec. 618;

for performing work and labor on a house, the house itself belonging to and being under the control of the owner or some one who represents him, is discharged by the destruction of such house without the fault of the contractor who has done work thereon under his contract, such contractor may recover a reasonable compensation for work done by him before such discharge.³ Thus a contract to do lathing and plastering,⁴ part of the brick and mason work,⁵ to do work other than grading, excavating, stone and brick work and plumbing,⁶ to put a tin roof on,⁷ to place pews in a church,⁸ to repair and remodel an existing structure,⁹ or to remove an existing building,¹⁰ are each discharged by a destruction of such building without contractor's fault, before the contract is performed and the contractor may recover on *quantum meruit*. However, a contract to install a ventilating system has been held not to be discharged by the destruction of the building in which it is being constructed. Accordingly, the contractors cannot recover a reasonable compensation for work done.¹¹ Where A agreed to construct an annex to B's building, and building and annex were both burned, it was held that the contract was discharged, and that the owner could recover only the excess of payments made by him to the

Harrington v. Iron Works, 119 Mass. 82; Hargrave v. Conroy, 19 N. J. Eq. 281; Clark v. Gilbert, 26 N. Y. 279; 84 Am. Dec. 189; McClellan v. Harris, 7 S. D. 447; 64 N. W. 522; Hubbard v. Belden, 27 Vt. 645; Green v. Gilbert, 21 Wis. 395.

³ Rawson v. Clark, 70 Ill. 656; Schwartz v. Saunders, 46 Ill. 18; Butterfield v. Byron, 153 Mass. 517; 25 Am. St. Rep. 654; 12 L. R. A. 571; 27 N. E. 667; Cleary v. Sohier, 120 Mass. 210; Haynes v. Church, 88 Mo. 285; 57 Am. Rep. 413; Wilson v. Knott, 3 Humph. (Tenn.) 473; Weis v. Devlin, 67 Tex. 507; 60 Am. Rep. 38; 3 S. W. 726; Clark v. Franklin, 7 Leigh (Va.) 1; Hysell v. Sterling, etc., Co., 46 W. Va. 158; 33 S. E. 95; Cook v. McCabe,

53 Wis. 250; 40 Am. Rep. 765; 10 N. W. 507.

⁴ Cleary v. Sohier, 120 Mass. 210.

⁵ Cook v. McCabe, 53 Wis. 250; 40 Am. Rep. 765; 10 N. W. 507.

⁶ Butterfield v. Byron, 153 Mass. 517; 25 Am. St. Rep. 654; 12 L. R. A. 571; 27 N. E. 667.

⁷ Hysell v. Sterling, etc., Co., 46 W. Va. 158; 33 S. E. 95.

⁸ Haynes v. Church, 88 Mo. 285; 57 Am. Rep. 413.

⁹ Weis v. Devlin, 67 Tex. 507; 60 Am. Rep. 38; 3 S. W. 726.

¹⁰ Angus v. Scully, 176 Mass. 357; 79 Am. St. Rep. 318; 49 L. R. A. 562; 57 N. E. 674.

¹¹ Huyett, etc., Mfg. Co. v. Edison Co., 167 Ill. 233; 59 Am. St. Rep. 272; 47 N. E. 384.

contractor over payments made by the contractor under the contract.¹² If the impossibility is created by act of the law, recovery may be had for whatever has been parted with under such contract. A had permission from the Secretary of the Treasury to search for a boatful of gold which had been sunk in East River during the War of the Revolution. B advanced to A money to be expended in this search, A promising to pay B ten times as much money as B advanced to him in case the treasures were recovered. The Secretary of the Treasury subsequently canceled A's permission to make such search. A was held bound to refund to B the amount of money remaining in his hands unexpended.¹³

§1601. Right of party not excused from complete performance to recover.—No benefit to adversary.

The next case to consider is that of a party who has not fully performed and has not been discharged from the contract or excused from further performance. His right to ignore the contract and recover a reasonable compensation for work done is to be determined by answering one or both of the following questions: (1) Has a partial performance for which recovery is sought resulted in financial benefit to the party from whom it is sought? (2) Is such default wilful, or is it caused by something beyond the control of the party in default though not amounting to a discharge of his liability? If the partial performance for which recovery is sought has not resulted in financial benefit to the party against whom recovery is sought, the party who has performed such services cannot recover in any event.¹ The fact that performance was prevented by some external fact beyond his control,² or that the partial performance was expensive to him,³ neither of them give him any

¹² *Krause v. Crothersville*, — Ind. —; 70 N. E. 264. (In this case the contractor had spent more than he had received and no recovery was allowed.)

¹³ *Thomas v. Hartshorne*, 45 N. J. Eq. 215; 3 L. R. A. 381; 16 Atl. 916.

¹ *Boughton v. Smith*, 142 N. Y. 674; 37 N. E. 470; *Genni v. Hahn*, 82 Wis. 90; 51 N. W. 1096.

² *Remy v. Olds*, 88 Cal. 537; 21 L. R. A. 645; 26 Pac. 355.

³ *Peacock v. Gleesen*, 117 Ia. 291; 90 N. W. 610.

right to recover more than the amount of the benefits conferred upon the party against whom the recovery is sought, and if no such benefits exist there is no right of recovery. Thus one who agrees to build a house for another, and who constructs such building in whole or in part, cannot recover anything if before the building is accepted by the owner it is destroyed by fire,⁴ by storm,⁵ or other casualty. In such cases no benefit from such part performance has accrued to the owner, and therefore no recovery can be had against him. If, however, one of several buildings to be constructed under an entire contract has been accepted by the owner, the contractor may recover for his work if such building is subsequently destroyed by fire before the rest of the contract is performed.⁶ So under a contract to drill a well to produce a certain supply of water, no recovery can be had for work and labor in drilling a hole, where work was stopped by the breaking of the drill rod before water was reached.⁷ So no recovery can be had where A agreed to plow and set out vines in the fall and keep them in good condition for three years in consideration of a conveyance of other realty to be made to him, but A did not do such work in the fall on account of heavy rains; but did it the following spring, and the vines failed and the owner of the realty ordered him to vacate.⁸

§1602. Recovery in case of breach not excused but not wilful.

Some authorities recognize a class of cases intermediate between those in which a legal excuse for non-performance exists and those in which a wilful breach exists; namely, a class of cases in which the party in default has attempted to perform in good faith but has been prevented by facts beyond his control but which do not in legal contemplation excuse non-

⁴ *Fildew v. Besley*, 42 Mich. 100; 36 Am. Rep. 433; 3 N. W. 278.

⁵ *Parker v. Scott*, 82 Ia. 266; 47 N. W. 1073.

⁶ *Atlantic, etc., Ry. v. Construction Co.*, 98 Va. 503; 37 S. E. 13.

⁷ *Peacock v. Gleesen*, 117 Ia. 291;

90 N. W. 610. The fact that the driller offered to drill another well, which offer was refused, was immaterial.

⁸ *Remy v. Olds*, 88 Cal. 537; 21 L. R. A. 645; 26 Pac. 355.

performance. In such cases recovery can be had for a reasonable compensation for benefits received under the contract.¹ The contract is broken but there is "not a willful dereliction of duty."² Thus recovery can be had for work done under a contract for the whole season and abandoned before the season was over because of threats of strikers, subject to a counterclaim for damages for such breach.³ So if one in good faith attempts to perform a building contract, but does not succeed in even substantial performance, he may, if the work done is accepted, recover the reasonable value of such work.⁴ In such cases the contract as far as it can be traced is decisive as to the reasonable value of the work done.⁵ The amount of recovery, therefore, in those cases where the original contract has not been entirely abandoned is the contract price less whatever damage has been caused by failure to comply with the contract exactly.⁶ This is the same amount of recovery as is allowed in cases of substantial performance.⁷ The application of the principles discussed in this section, therefore, results in giving the same amount of recovery in case of material deviation from the contract as in cases of substantial performance;

¹ *Dermott v. Jones*, 2 Wall. (U. S.) 1; s. c., 23 How. 220; *Pinches v. Church*, 55 Conn. 183; 10 Atl. 264; *Morford v. Ambrose*, 3 J. J. Mar. (Ky.) 688; *Gleason v. Smith*, 9 Cush. (Mass.) 484; 57 Am. Dec. 62; *Newman v. McGregor*, 5 Ohio 349; 24 Am. Dec. 293; *Porter v. Woods*, 3 Humph. (Tenn.) 56; 39 Am. Dec. 153; *Barrett v. Coke Co.*, 51 W. Va. 416; 90 Am. St. Rep. 803; 41 S. E. 220; *Walsh v. Fisher*, 102 Wis. 172; 72 Am. St. Rep. 865; 43 L. R. A. 810; 78 N. W. 437. "Where he has been guilty of fraud or has wilfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract and the other party has sanctioned

or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*. *Dermott v. Jones*, 2 Wall. (U. S.) 1, 9.

² *Barrett v. Coke Co.*, 51 W. Va. 416; 90 Am. St. Rep. 803; 41 S. E. 220.

³ *Walsh v. Fisher*, 102 Wis. 172; 72 Am. St. Rep. 865; 43 L. R. A. 810; 78 N. W. 437.

⁴ *Dermott v. Jones*, 2 Wall. (U. S.) 1; s. c., 23 How. (U. S.) 220.

⁵ *Dermott v. Jones*, 2 Wall. (U. S.) 1; *Hayward v. Leonard*, 7 Pick. (Mass.) 181; 19 Am. Dec. 268.

⁶ *Escott v. White*, 10 Bush. (Ky.) 169; *Hayward v. Leonard*, 7 Pick. (Mass.) 181; 19 Am. Dec. 268; *Steeple v. Newton*, 7 Or. 110; 33 Am. Rep. 705; *Gallagher v. Sharpless*, 134 Pa. St. 134; 19 Atl. 491.

⁷ See § 1385 *et seq.*

and makes the differences between them chiefly one of pleading — a difference which may easily vanish under the Code of Civil Procedure. It certainly seems just, however, that if recovery should be allowed it should never exceed the price fixed by the contract for the work actually done.⁸ In cases of substantial performance where, for any reason, recovery cannot be had upon the contract, recovery can be had for reasonable compensation.⁹ Thus if work is to be done to the satisfaction of the owner's agent, it is held in some jurisdictions that in case of substantial performance the contractor can recover on *quantum meruit* if such agent withholds his approval.¹⁰ The reasonable value is to be obtained by deducting from the contract price the damage caused by deviation from the contract.¹¹ So recovery can be had for such goods as are accepted under a contract to furnish goods to the satisfaction of the vendee's agent if the vendor has in good faith attempted to perform, though the amount accepted was much less than the amount contracted for.¹²

§1603. Benefit to adversary.—Theory of no recovery in case of wilful breach.

Where partial performance has resulted in benefit to the adversary party, though not the benefit contracted for by him, there is a divergence of authorities, both as to the general theories determining the right of the parties and as to their application to particular states of fact. It may here be noted, as has already been said, that the doctrine of breach as preventing recovery, applies only to entire contracts.¹ If the contract is severable, a breach of one of the severable provisions has no

⁸ McKinney v. Springer, 3 Ind. 59; 54 Am. Dec. 470.

⁹ Powell v. Howard, 109 Mass. 192; Cullen v. Sears, 112 Mass. 299; White v. McLaren, 151 Mass. 553; 24 N. E. 911; McCue v. Whitwell, 156 Mass. 205; 30 N. E. 1134; Cardell v. Bridge, 9 All. (Mass.) 355; Walker v. Orange, 16 Gray (Mass.) 193; Hayward v. Leonard,

7 Pick. (Mass.) 181; 19 Am. Dec. 268.

¹⁰ Norwood v. Lathrop, 178 Mass. 208; 59 N. E. 650.

¹¹ Norwood v. Lathrop, 178 Mass. 208; 59 N. E. 650.

¹² Barrett v. Coke Co., 51 W. Va. 416; 90 Am. St. Rep. 803; 41 S. E. 220.

¹ See § 1483 *et seq.*

effect as a discharge of other severable provisions of the same contract. Some authorities hold that a wilful and unjustifiable abandonment of a contract prevents recovery for the benefits conferred by a partial performance.² Recovery of reasonable compensation may be had, it is said, only if the contract has been performed fully, or if some legal excuse for non-performance exists.³ Thus abandonment of an entire contract for performing services,⁴ as a contract to construct a ditch,⁵ or the abandonment of a building contract,⁶ or a contract to construct waterworks,⁷ or a contract to furnish goods, as all the granite needed for a certain building,⁸ or one half the crop of corn in a certain field,⁹ have each been held to prevent recovery for

² *Forman & Co. v. The Liddesdale* (1900), App. Cas. 190; *Hansbrough v. Peck*, 5 Wall. (U. S.) 497; *Hogan v. Titlow*, 14 Cal. 255; *Coburn v. Hartford*, 38 Conn. 290; *Thrift v. Payne*, 71 Ill. 408; *Serber v. McLaughlin*, 97 Ill. App. 104; *Escott v. White*, 10 Bush (Ky.) 169; *Thayer v. Wadsworth*, 19 Pick. (Mass.) 349; *Scheible v. Klein*, 89 Mich. 376; 50 N. W. 857; *Elliott v. Caldwell*, 43 Minn. 357; 9 L. R. A. 52; 45 N. W. 845; *Kohn v. Frandel*, 29 Minn. 470; 13 N. W. 904; *Nelicka v. Esterly*, 29 Minn. 146; 12 N. W. 457; *Weber v. Clark*, 24 Minn. 354; *Butt v. Williams* (Miss.), 15 So. 130; *Posey v. Garth*, 7 Mo. 94; 37 Am. Dec. 183; *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442; *Bonesteel v. New York*, 22 N. Y. 162; *Van Clief v. Van Vechten*, 130 N. Y. 571; 20 N. E. 1017; *Ginther v. Shultz*, 40 O. S. 104; *Harris v. Sharpless*, 202 Pa. St. 243; 58 L. R. A. 214; 51 Atl. 965; *Hartman v. Meighan*, 171 Pa. St. 46; 33 Atl. 123.

³ *Phelps v. Hubbard*, 59 Ill. 79; *Marshall v. Jones*, 11 Me. 54; 25 Am. Dec. 260; *Denmead v. Coburn*, 15 Md. 29; *Fairfax, etc., Co. v.*

Chambers, 75 Md. 604; 23 Atl. 1024; *Olmstead v. Beale*, 19 Pick. (Mass.) 528.

⁴ *Wright v. Turner*, 1 Stew. (Ala.) 29; 18 Am. Dec. 35; *Badgley v. Heald*, 9 Ill. 64; *Eldridge v. Rowe*, 7 Ill. 91; 43 Am. Dec. 41; *Miller v. Goddard*, 34 Me. 102; 56 Am. Dec. 638; *Homer v. Shaw*, 177 Mass. 1; 58 N. E. 160; *Davis v. Maxwell*, 12 Met. (Mass.) 286; *Timberlake v. Thayer*, 71 Miss. 279; 24 L. R. A. 231; 14 So. 446; *Lantry v. Parks*, 8 Cow. (N. Y.) 63; *Larkin v. Buck*, 11 O. S. 561; *Steamboat Co. v. Wilkins*, 8 Vt. 54.

⁵ *Steeple v. Newton*, 7 Or. 110; 33 Am. Rep. 705.

⁶ *Sumpter v. Hedges* (1898), 1 Q. B. 673; *Feeney v. Bardsley*, 66 N. J. L. 239; 49 Atl. 443; *Bozarth v. Dudley*, 44 N. J. L. 304; 43 Am. Rep. 373; *Allen v. Curles*, 6 O. S. 505; *Malbon v. Birney*, 11 Wis. 107.

⁷ *Vicksburg Water-Supply Co. v. Gorman*, 70 Miss. 360; 11 So. 680.

⁸ *Cohn v. Plumer*, 88 Wis. 622; 60 N. W. 1000.

⁹ *Witherow v. Witherow*, 16 Ohio 238. (Delivery of part only.)

the benefits conferred by partial performance if wilful and unjustifiable. Thus if a contractor wilfully abandons his contracts and leaves the building so unfinished and incomplete that the owner derives no benefit from the labor or materials,¹⁰ or if he uses material of a quality inferior to that specified in the contract,¹¹ even if the building as constructed is a fair average job,¹² he has not performed substantially and cannot recover. So no recovery can be had by a contractor who erects a building for a boat-house and violates a provision of the contract that it is to be in line with a certain dock.¹³ So no recovery can be had by a sewer contractor who fraudulently uses material inferior to that specified in the contract.¹⁴ So no recovery for a reasonable compensation can be had for painting a house under a special contract where the work done was not a substantial performance of the contract.¹⁵ So no recovery can be had for lithographing and printing catalogue covers where after the proof has been accepted, the printers without the consent or knowledge of the adversary party add the imprint of their own firm name, even if such imprint does not appreciably detract from the artistic effect of the covers.¹⁶ So willful abandonment of a contract for support in consideration of a contract to devise certain realty, does not entitle the promisor, who had been in possession under such contract, to reimbursement for improvements.¹⁷ So one who has paid money in partial performance of a contract which he has then without legal excuse refused to perform fully cannot recover it.¹⁸

¹⁰ *Marchant v. Hayes*, 117 Cal. 669; 49 Pac. 840.

¹¹ *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114; 38 Pac. 635.

¹² *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114; 38 Pac. 635.

¹³ *Houlahan v. Clark*, 110 Wis. 43; 85 N. W. 676.

¹⁴ *Schmidt v. North Yakima*, 12 Wash. 121; 40 Pac. 790.

¹⁵ *Ginther v. Shultz*, 40 O. S. 104.

¹⁶ *Harris v. Sharples*, 202 Pa. St. 243; 58 L. R. A. 214; 51 Atl. 965.

¹⁷ *Andrews v. Andrews*, 122 N. C. 352; 29 S. E. 351.

¹⁸ *Hansbrough v. Peck*, 5 Wall. (U. S.) 497; *Downey v. Riggs*, 102 Ia. 88; 70 N. W. 1091; *Hapgood v. Shaw*, 105 Mass. 276; *Leonard v. Morgan*, 6 Gray (Mass.) 412; *Pierce v. Jarnagin*, 57 Miss. 107; *Lexington, etc., Co. v. Neuens*, 42 Neb. 649; 60 N. W. 893; *Dula v. Cowles*, 7 Jones L. (N. C.) 290; 75 Am. Dec. 463; *Neis v. O'Brien*,

Thus if A under a contract to buy chattels pays part of the purchase price in advance and then wrongfully refuses to receive such chattels under the erroneous belief that they did not correspond to the provisions of the contract, he cannot recover the payment thus made,¹⁹ even if the vendor then resells the chattels for more than the amount still due.²⁰ So if A under a contract to buy realty pays part of the purchase money, and then is unable or unwilling to complete his contract, he cannot recover the amount thus paid in,²¹ even though there is no clause of forfeiture in the contract.²² The vendee in default cannot recover for improvements erected by him upon such realty.²³

§1604. Theory of recovery even in case of wilful breach.

Other authorities have held that even under a wilful and unjustifiable abandonment of a contract, recovery should be had for the reasonable value of benefits accepted and retained by the party against whom relief is sought, less the damages occasioned to him by such breach.¹ This is spoken of as "the more modern rule."² Thus taking possession of a building which was not constructed in substantial compliance with the terms of the contract, has been held to make the owner liable

12 Wash. 358; 50 Am. St. Rep. 894; 41 Pac. 59.

¹⁹ Neis v. O'Brien, 12 Wash. 358; 50 Am. St. Rep. 894; 41 Pac. 59.

²⁰ Neis v. O'Brien, 12 Wash. 358; 50 Am. St. Rep. 894; 41 Pac. 59.

²¹ Hansbrough v. Peck, 5 Wall. (U. S.) 497; Baston v. Clifford, 68 Ill. 67; 18 Am. Rep. 547; Downey v. Riggs, 102 Ia. 88; 70 N. W. 1091; Roach v. Waid, 2 T. B. Mon. (Ky.) 142; Davis v. Hall, 52 Md. 673; McManus v. Blackmarr, 47 Minn. 331; 50 N. W. 230; Lawrence v. Miller, 86 N. Y. 131.

²² Downey v. Riggs, 102 Ia. 88; 70 N. W. 1091.

²³ Hansbrough v. Peck, 5 Wall.

(U. S.) 497; Roach v. Waid, 2 T. B. Mon. (Ky.) 142.

¹ McDonough v. Marble Co., 112 Fed. 634; 50 C. C. A. 403; Wolf v. Gerr, 43 Ia. 339; McClay v. Hedge, 18 Ia. 66; Pixler v. Nichols, 8 Ia. 106; 74 Am. Dec. 298; Barnwell v. Kempton, 22 Kan. 314; Duncan v. Baker, 21 Kan. 99; Hayward v. Leonard, 7 Pick. (Mass.) 181; 19 Am. Dec. 268; Parcell v. McComber, 11 Neb. 209; 38 Am. Rep. 366; 35 Am. Rep. 476 N.; 7 N. W. 529; Bedow v. Tonkin, 5 S. D. 432; 59 N. W. 222; Hillyard v. Crabtree, 11 Tex. 264; 62 Am. Dec. 475.

² McDonough v. Marble Co., 112 Fed. 634; 50 C. C. A. 403.

for a reasonable compensation therefor.³ In such cases, however, the builder's right of recovery is limited by the contract price. He cannot, by abandonment, transfer to himself such profits as the owner may have obtained by reason of an advantageous bargain.⁴ Thus A agreed to furnish twenty-three thousand feet of marble tiling. He furnished less than twenty thousand feet. It was held that he could recover for the amount furnished.⁵ Under a contract of employment recovery can be had for a reasonable compensation for work thereunder though the employe has abandoned the contract before the term of employment has expired.⁶ So recovery can be had for the reasonable value of cattle delivered under a contract, though the full amount agreed upon was not delivered.⁷ In studying the principles here discussed, as enforced by the courts, one is sometimes driven to inquire whether a special contract means anything.

§1605. Right of recovery for benefits received or retained with knowledge of breach.

If a party to a contract receives benefits thereunder, with knowledge of breach by the adversary party,¹ or if, after knowl-

³ Davis v. Badders, 95 Ala. 348; 10 So. 422; Lyon County School District v. Lund, 51 Kan. 731; 33 Pac. 595; Wabaunsee County School District v. Boyer, 46 Kan. 54; 26 Pac. 484.

⁴ Gillis v. Cobe, 177 Mass. 584; 59 N. E. 455.

⁵ McDonough v. Marble Co., 112 Fed. 634; 50 C. C. A. 403.

⁶ Ricks v. Yates, 5 Ind. 115; Pixler v. Nichols, 8 Ia. 106; 74 Am. Dec. 298; Duncan v. Baker, 21 Kan. 99; Lamb v. Brolaski, 38 Mo. 51; Parcell v. McComber, 11 Neb. 209; 38 Am. Rep. 366; 35 Am. Rep. 476; 7 N. W. 529; Britton v. Turner, 6 N. H. 481; 26 Am. Dec. 713; Bedow

v. Tonkin, 5 S. D. 432; 59 N. W. 222; Riggs v. Horde, 25 Tex. Supp. 456; 78 Am. Dec. 584.

⁷ Saunders v. Short, 86 Fed. 225; 30 C. C. A. 462. So if other property. Watson v. Kirby, 112 Ala. 436; 20 So. 624.

¹ Katz v. Bedford, 77 Cal. 319; 1 L. R. A. 826; 19 Pac. 523; Walsh v. Jenvey, 85 Md. 240; 36 Atl. 817; 38 Atl. 938; Sykes v. St. Cloud, 60 Minn. 442; 62 N. W. 613; West v. Van Pelt, 34 Neb. 63; 51 N. C. 313; Simpson v. R. R., 112 N. C. 703; 16 S. E. 853; Smith v. Packard, 94 Va. 730; 27 S. E. 586; Empire, etc., Co. v. Coke Co., 51 W. Va. 474; 41 S. E. 917.

edge of such breach, he retains such benefits,² he should account at least for a reasonable compensation therefor. Thus voluntary acceptance of an electric light plant,³ or of a job of electric wiring,⁴ or a waterworks,⁵ which does not substantially comply with the contract, renders the party so accepting liable for a reasonable compensation therefor. So accepting and retaining machines not built in compliance with the contract makes the vendee liable for their value as chattels.⁶ So one who delivers brick,⁷ or other goods,⁸ under a contract where such delivery is not a full performance of such contract, but the vendee accepts such goods, may recover a reasonable compensation therefor. So accepting work done in grading and constructing streets and sidewalks after failure of the contractor to complete the work within the time agreed upon, creates a liability to pay a reasonable compensation for the work done.⁹ So accepting books from one who has agreed to clean and bind them for a certain price, makes the owner so receiving them liable for a reasonable compensation if the contract has not been performed fully by the adversary party.¹⁰ In such an action the adversary party cannot recover liquidated damages under a clause in the original contract providing therefor.¹¹ Some authorities hold, however, that if goods are delivered or work done before the contract is broken, the party in default cannot recover therefor after such breach, even if the adversary party could return the property or the benefits thereof if he wished. Thus if delivery of a specified quantity is to be made in installments, and, after partial performance, the vendor refuses to

² *Thompson Mfg. Co. v. Gunder-son*, 106 Wis. 449; 49 L. R. A. 859; 82 N. W. 299.

³ *Florence, etc., Co. v. Hanby*, 101 Ala. 15; 13 So. 343.

⁴ *Smith v. Packard*, 94 Va. 730; 27 S. E. 586.

⁵ *Sykes v. St. Cloud*, 60 Minn. 442; 62 N. W. 613; *Sherman v. Connor*, 88 Tex. 35; 29 S. W. 1053.

⁶ *Thompson Mfg. Co. v. Gunder-son*, 106 Wis. 449; 49 L. R. A. 859; 82 N. W. 299.

⁷ *Barrett v. Coal Co.*, 51 W. Va. 416; 90 Am. St. Rep. 803; 41 S. E. 220.

⁸ *Watson v. Kirby*, 112 Ala. 436; 20 So. 624. (Less amount delivered than contracted for.)

⁹ *Orem v. Keelty*, 85 Md. 337; 36 Atl. 1030.

¹⁰ *Walsh v. Jenvey*, 85 Md. 240; 36 Atl. 817; 38 Atl. 938.

¹¹ *Orem v. Keelty*, 85 Md. 337; 36 Atl. 1030.

deliver the full amount stipulated in the contract, it has been held that no recovery in *quantum meruit* can be had for the amount delivered.¹² Other examples of the application of the principle last mentioned are found where money has been paid under a contract by one who then refuses full performance, and his right to recover such money is denied.¹³ If, on the other hand, he received the benefits without knowing of the breach, and if the benefits are of such sort that it is impossible for him to return the benefits to the adversary party, it is difficult to see why the party not in default should be held for liability which he did not assume by his contract. Thus it has been held that as the owner of land on which a house has been built has no real choice in accepting or rejecting it, he is not liable to pay a reasonable compensation therefor if it does not comply with the contract at least substantially.¹⁴ So if a subscription is made to a board of trade building, payable if the building is completed by a subsequent time, no recovery can be had if the building is not completed until a later time, even if the value of the subscriber's property is increased thereby.¹⁵ Some authorities, however, hold that if the owner uses the building for his own benefit he is liable for the reasonable value of the work, labor and material therefor, even if the contract has not been complied with.¹⁶

¹² *Witherow v. Witherow*, 16 Ohio 238.

¹³ See § 1603.

¹⁴ *Dermott v. Jones*, 23 How. (U. S.) 220; *Elliott v. Caldwell*, 43 Minn. 357; 9 L. R. A. 52; 45 N. W. 845.

¹⁵ *Cincinnati, etc., R. R. v. Bensley*, 51 Fed. 738; 19 L. R. A. 796; 2 C. C. A. 480.

¹⁶ *Lyon County School District v. Lund*, 51 Kan. 731; 33 Pac. 595; *Dixon v. Gravely*, 117 N. C. 84; 23 S. E. 39.

CHAPTER LXXV.

SPECIFIC PERFORMANCE.

I. NATURE AND HISTORY.

§1606. History of doctrine of specific performance.

The theory underlying the remedy given by the Common Law in recent times for breach of contract is compensation in the form of money damages. This was not the original theory of the king's courts even before the days of the action of covenant.¹ So, after the action of covenant appeared it was often used as a means of giving what was in effect specific performance.² Thus at a time when the owner of a term of years was not looked upon as having an estate in the land, but only a right under contract, he could recover the land itself in an action at law on the covenant.³ So a feoffor in case of breach of his covenant of warranty is adjudged to give to the feoffee lands of equal value, and not the value thereof in money.⁴ The most conspicuous example of this original theory of the Common Law is the fine as a conveyance of realty. This became so thoroughly stereotyped as a fictitious conveyance that we are in danger of overlooking its original significance. An action was brought on an executory covenant to convey specific realty. While in form this action was always com-

¹ "For it is a consequence which naturally results from . . . undertaking to do any particular act that the party should be compelled to abide by it or perform it." Glanville, Bk. VIII., C. V., referring to the concord of a fine.

² Pollock and Maitland's History

of English Law, II. 521, 522 (original paging).

³ Pollock and Maitland's History of English Law, II. 106 (original paging) citing a case from A. D. 1226.

⁴ Pollock and Maitland's History of English Law, II. 522 (original paging).

promised by leave of the court, the underlying theory was that the court had power to compel the defendant to perform his executory covenant and convey the realty agreed upon.⁵ Thus Glanville tells us⁶ that if the concord is established "then the party who has broken the concord shall be amerced to the king and shall be safely attached, until he find good security that he will from thenceforth keep the concord by adhering to its terms, if possible, or will otherwise make his adversary a reasonable recompense." This was, of course, before a separate action of covenant existed. Pollock and Maitland cite illustrations from local courts to show what is substantially specific performance of contracts for which equity at a later date would refuse specific performance, such as a contract for personal services or for making a rudder.⁷ In the early stages of the Common Law relief was therefore as specific as it could be had. By the time that the Common Law assumed its classic form, however, it had become a fundamental maxim that in actions *ex contractu* the relief given must be compensatory and not specific. It is therefore not remarkable that bills for a specific performance of contracts "are amongst the earliest that are recorded in the Court of Chancery."⁸ With the rise of equity "the want of a more specific remedy than can be obtained in the courts of law,"⁹ gave to the chancellors an opportunity to extend their jurisdiction that they were not slow to take advantage of; and it became an established maxim of equity that relief should, if possible, be specific rather than compensatory, which as applied to contracts meant that in cases coming properly within the jurisdiction of equity, specific performance would be decreed if the circumstances required it. Specific performance is not restricted to the cases for which

⁵ Pollock and Maitland's History of English Law, II., 593 (original paging). Black. Com. II., 348.

⁶ Bk. VIII., C. V. (Beames's Translation).

⁷ Pollock and Maitland's History

of English Law, II. 593 (original paging).

⁸ Spence on Equitable Jurisdiction, I., 645; citing Cal. II. 2, temp. Rich. II.; Lord Scales v. Felbrigg, Cal. II., 26.

⁹ Black. Com. III., 438.

precedents exist; but is given wherever the broad principles which control the subject make such relief proper.¹⁰

II. GENERAL ELEMENTS WHICH CONTRACT MUST POSSESS.

§1607. Contract must be enforceable generally.

In order to entitle the plaintiff to the relief of specific performance the contract sought to be enforced must as a general rule have at least all the elements that make a contract enforceable at law.¹ To discuss this branch of the subject in detail would require a repetition of all that has been said of the formation of simple contracts. Some illustrations of this doctrine will be all that will be attempted. It will be observed that equity requires, so to speak, a higher standard for specific performance than the law requires for enforcement by money damages.

§1608. Want of offer and acceptance.

Thus if no offer and acceptance exist,¹ as where the parties have never even in outward form come to an agreement,² as for example where there is no acceptance,³ or no acceptance is made until after the offer has lapsed,⁴ or the attempted acceptance is in terms different from the offer,⁵ or where there is an apparent offer and acceptance which is really lacking in some essential element, as where there is a mistake in the execution

¹⁰ "In the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded and no inflexible rule has been permitted to circumscribe them." *Union Pacific Ry. v. Ry.*, 163 U. S. 564, 600.

¹ *Buettgenbach v. Gerbig* (Neb.), 90 N. W. 654.

¹ *Rushton v. Thompson*, 35 Fed. 635; *Suydam v. Ins. Co.*, 18 Ohio 459; *Rose v. Oliver*, 32 Or. 447; 52 Pac. 176.

² *Pacific Rolling Mill Co. v. Ry.*, 90 Cal. 627; 27 Pac. 525; *Clipson v. Villars*, 151 Ill. 165; 37 N. E. 695; *Wardell v. Williams*, 62 Mich. 50; 4 Am. St. Rep. 814; 28 N. W. 796.

³ *Clipson v. Villars*, 151 Ill. 165; 37 N. E. 695; *Parker v. Stephens*, 3 A. K. Mar. (Ky.) 197.

⁴ *Childs v. Gillespie*, 147 Pa. St. 173; 23 Atl. 312.

⁵ *Bentz v. Eubanks*, 41 Kan. 28; 20 Pac. 505.

of a written contract,⁶ or misrepresentation,⁷ or fraud, specific performance will be refused. Mistake as to a collateral matter, induced by false statements of a third person not connected with either party to the contract is no more reason for refusing specific performance⁸ than it would be for refusing to enforce the contract at law.⁹ Equity may, however, refuse relief where circumstances of unfairness or oppression exist, even if the law would not recognize such facts as grounds for avoiding the contract. If the party seeking relief did not intend to perform the terms of the contract on his part to be performed, when he entered into the contract, the court does not abuse its judicial discretion by refusing specific performance.¹⁰ The partial adoption by the law of equitable doctrines in cases of constructive fraud and undue influence is gradually eliminating this distinction, once so clearly marked. Want of offer and acceptance is also involved in the subject of mutuality.¹¹

§1609. Certainty.

To be enforceable either at law or in equity a contract must be definite.¹ This requisite is especially insisted upon when specific performance is sought,² and specific performance may

⁶ Wilkin v. Voss, 120 Ia. 500; 94 N. W. 1123; Hall v. Loomis, 63 Mich. 709; 30 N. W. 374. Even in cases of specific performance one who has the means of knowing the contents of a written contract which he signs is said to be estopped to deny that he knew its contents; Minneapolis, etc., Ry. v. Cox, 76 Ia. 306; 14 Am. St. Rep. 216; 41 N. W. 24.

⁷ Todd v. Iron Co., 8 Houst. (Del.) 372; 14 Atl. 27. (Deceit as to value of stock.) New England Trust Co. v. Abbott, 162 Mass. 148; 27 L. R. A. 271; 38 N. E. 432.

⁸ Wilson v. Keating, 4 De G. & J. 588.

⁹ See §§ 129, 155.

¹⁰ Engberry v. Rousseau, 117 Wis. 52; 93 N. W. 824.

¹¹ See § 1615 *et seq.*

¹ See §§ 27, 28.

² De Sollar v. Hanscome, 158 U. S. 216; Carr v. Duval, 14 Pet. (U. S.) 77; Foster v. Maginnis, 89 Cal. 264; 26 Pac. 828; Todd v. Iron Co., 8 Houst. (Del.) 372; 14 Atl. 27; Glos v. Wilson, 198 Ill. 44; 64 N. E. 734; Shaw v. Schoonover, 130 Ill. 448; 22 N. E. 589; Burke v. Mead, 159 Ind. 252; 64 N. E. 880; Corliss v. Conable, 74 Ia. 58; 36 N. W. 891; Blanchard v. Ry., 31 Mich. 43; 18 Am. Rep. 142; Lowe v. Lowe, 83 Minn. 206; 83 N. W. 11; Burke v. Ray, 40 Minn. 34; 41 N. W. 240; Kinney v. Murray, 170 Mo. 674; 71

be refused even though damages may be obtained at law.³ A contract which does not fix the time of performance and yet shows that a definite time was intended and not a reasonable time is too indefinite for specific enforcement.⁴ Thus a contract for the purchase of stock in part on credit, without provisions as to the time when the purchase price is to be paid or the stock transferred, or as to the security to be given for deferred payments,⁵ or a contract for the sale of realty on credit, which provides for giving a mortgage or mortgages as security, but does not provide for the number of mortgages, the date of payment or the order of payment,⁶ or a contract which does not show the agreement of the parties as to the assumption of a mortgage,⁷ are each too indefinite to be enforced specifically. So a contract for the sale of realty which does not describe it so that it can be located definitely,⁸ such as a contract for "four lots 25 feet by 150 feet deep in either section 8 or 9,"⁹ or a contract to convey a certain number of acres in any one of certain specified counties,¹⁰ or to convey one hundred acres of the west end of a tract, either that then owned by the vendor, or to be afterward acquired by him,¹¹

S. W. 197; *Largey v. Leggat*, — Mont. —; 75 Pac. 950; *Clarke v. Koenig*, 36 Neb. 572; 54 N. W. 842; *Moore v. Galupo*, — N. J. Eq. —; 55 Atl. 628; *Myers v. Metzger*, 63 N. J. Eq. 779; 52 Atl. 274; *Ferguson v. Blackwell*, 8 Okla. 489; 58 Pac. 647; *Knight v. Alexander*, 42 Or. 521; 71 Pac. 657; *Agnew v. Land Co.*, 204 Pa. St. 192; 53 Atl. 752; *Spear v. Long*, 32 S. C. 528; 11 S. E. 332; *Morrison v. Searight*, 4 Baxt. (Tenn.) 476; *Ensminger v. Peterson*, 53 W. Va. 324; 44 S. E. 218; *Hissam v. Parrish*, 41 W. Va. 686; 56 Am. St. Rep. 892; 24 S. E. 600; *Park v. Ry.*, 114 Wis. 347; 89 N. W. 532.

³ *Stanton v. Singleton*, 126 Cal. 657; 47 L. R. A. 334; 59 Pac. 146.

⁴ *Oxford v. Crow* (1895), 3 Ch. 535; *Todd v. Iron Co.*, 8 Houst.

(Del.) 372; 14 Atl. 27; *Williams v. Stewart*, 25 Minn. 516; *Moore v. Galupo*, — N. J. Eq. —; 55 Atl. 628.

⁵ *Todd v. Iron Co.*, 8 Houst. (Del.) 372; 14 Atl. 27.

⁶ *Moore v. Galupo*, — N. J. Eq. —; 55 Atl. 628.

⁷ *Tryce v. Dittus*, 199 Ill. 189; 65 N. E. 220.

⁸ *Bauer v. Coal Co.*, 209 Ill. 316; 70 N. E. 634; *Glos v. Wilson*, 198 Ill. 44; 64 N. E. 734; *Hanly v. Blackford*, 1 Dana (Ky.) 1; 25 Am. Dec. 114; *Agnew v. Land Co.*, 204 Pa. St. 192; 53 Atl. 752.

⁹ *Rampke v. Buehler*, 203 Ill. 384; 67 N. E. 796.

¹⁰ *Newman v. Perril*, 73 Ind. 153.

¹¹ *Knight v. Alexander*, 42 Or. 521; 71 Pac. 657

or a contract to convey lands described in another contract, the terms of which are not shown,¹² have each been held to be too indefinite to be enforced specifically. A contract in itself indefinite may be made definite by the subsequent conduct of the parties. Thus a contract to convey one acre out of a larger tract of land, which has been selected and taken possession of by the vendee before suit is brought,¹³ is thus rendered sufficiently definite. So if a contract contains terms which may be construed so as to be inconsistent, the subsequent conduct of the parties in construing them as consistent may make the contract sufficiently definite to be enforced specifically.¹⁴ A vendor cannot object that a modification of a contract, favorable to himself and treated by the vendee in his suit as a valid part of the contract, vitiates the whole contract for uncertainty by reason of a failure to name the vendee therein.¹⁵

§1610. Want of consideration.

If no consideration for the promise exists there is no contract and specific performance is of course refused.¹ An agreement to accept shares of stock on which nothing has ever been paid, and relieve the transferrer from all liability thereon is such consideration as to justify specific performance.² However, specific performance will be granted where under an oral promise to make a gift of realty possession has been surrendered to the donee and valuable improvements have been made by him.³ Inadequacy of consideration in contracts to pay

¹² *Ensminger v. Peterson*, 53 W. Va. 324; 44 S. E. 218.

¹³ *Cobban v. Hecklen*, 27 Mont. 245; 70 Pac. 805.

¹⁴ *Rank v. Garvey*, — Neb. —; 92 N. W. 1025.

¹⁵ *Pennsylvania Mining Co. v. Thomas*, 204 Pa. St. 325; 54 Atl. 101.

¹ *Winter v. Geobner*, 21 Colo. 279; 40 Pac. 570; *Geer v. Goudy*, 174 Ill. 514; 51 N. E. 623; *Preston v. Williams*, 81 Ill. 176 (obiter); *Bright*

v. Bright, 8 B. Mon. (Ky.) 194; *Selby v. Ease*, 87 Md. 459; 39 Atl. 1041; *Shinkle v. Vickery*, 156 Mo. 1; 55 S. W. 456; *McCampbell v. Farnsworth*, 3 Coldw. (Tenn.) 317; *Pennybacker v. Maupin*, 96 Va. 461; 31 S. E. 607; *Hibbert v. Mackinnon*, 79 Wis. 673; 49 N. W. 21.

² *Cheale v. Kenward*, 3 De G. & J. 27.

³ *Cauble v. Worsham*, 96 Tex. 86; 97 Am. St. Rep. 871; 70 S. W. 737. See § 725.

money in consideration for money is a ground for refusing relief in equity as well as in law. Thus equity will not enforce a note and mortgage for three thousand dollars, given to take up a note of two thousand dollars.⁴ Equity, in cases where specific performance is sought will go further than law, however, in requiring the consideration to be adequate. If the consideration is so inadequate that the contract is unconscionable specific performance will be refused, even though the contract may be enforceable at law, and the remedy of rescission may be denied to the defendant.⁵ The party seeking relief will be left to his remedy at law.⁶ While extreme inadequacy of consideration may be the occasion for refusing specific performance, the question must be decided by the facts as they exist when the contract is made, and not by the subsequent developments.⁷ Thus a contract to develop a mine, fair and reasonable when made, is not rendered unconscionable by the discovery at a subsequent time of a rich vein of ore.⁸ In contracts where consideration would be presumed at law, the same presumption will arise in equity where specific performance is sought, as in case of written contracts by the statutes of some states,⁹ or contracts under seal.¹⁰ Even in jurisdictions where a sealed contract was enforceable at law by reason of its form, irrespective of consideration, equity would not grant specific

⁴ Richardson v. Barrick, 16 Ia. 407.

⁵ Prince v. Lamb, 128 Cal. 120; 60 Pac. 689; Condon v. Osgood, 97 Ia. 1; 65 N. W. 1003 (contract made by unauthorized agent, for inadequate consideration); Lee v. Kirby, 104 Mass. 420; Butler v. Duncan, 47 Mich. 94; 41 Am. Rep. 711; 10 N. W. 123; Ferguson v. Blackwell, 8 Okl. 489; 58 Pac. 647; Conaway v. Sweeney, 24 W. Va. 643; Mulligan v. Albertz, 103 Wis. 140; 78 N. W. 1093.

⁶ Mathews v. Davis, 102 Cal. 202; 36 Pac. 358; Kelly v. Central P. R.

Co., 74 Cal. 557; 5 Am. St. Rep. 470; 16 Pac. 386; Sturgis v. Galindo, 59 Cal. 28; 43 Am. Rep. 239; Bruck v. Tucker, 42 Cal. 346.

⁷ Morrill v. Everson, 77 Cal. 114; 19 Pac. 190; Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123; Peterson v. Chase, 115 Wis. 239; 91 N. W. 687.

⁸ Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

⁹ Cone v. Cone, 118 Ia. 458; 92 N. W. 665.

¹⁰ Guyer v. Warren, 175 Ill. 328; 51 N. E. 580; Lyle v. Addicks, 62 N. J. Eq. 123; 49 Atl. 1121.

performance unless a valuable consideration existed.¹¹ Lack of consideration is also involved in the subject of mutuality.¹²

§1611. Illegal and void contracts.

If the subject-matter is such as to make the contract void or illegal at law, equity will not grant specific performance.¹ Thus where an institution owning land which it could not alienate by the terms of the grant to it, agrees with a city and a third person to sell the property to such third person by having the city go through the form of taking it for park purposes by eminent domain and then conveying to such third person, specific performance will not be given.² In denying relief on this ground, equity is not, however, limited to cases where the law would decline to act, but may refuse relief even in cases where the contract might be enforceable at law. A contract whereby A was to furnish evidence to establish B's claim to certain realty, and to manage it, and conduct it at his own expense, cannot be specifically enforced even if valid at law.³

§1612. Defendant of abnormal status.

Specific performance cannot be given against a party as to whom the contract is void or voidable. Thus specific performance cannot be given against a married woman.¹ So a contract

¹¹ *Crandall v. Willig*, 166 Ill. 233; 46 N. E. 755.

¹² See § 1615 *et seq.*

¹ *Simons v. Bedell*, 122 Cal. 341; 68 Am. St. Rep. 35; 55 Pac. 3; *Swint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44; *South Chicago, etc., Ry. v. Ry.*, 171 Ill. 391; 49 N. E. 576; *Bowman v. Cunningham*, 78 Ill. 48; *Parks v. McKamy*, 3 Head. (Tenn.) 297; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294; 34 Am. Dec. 648; *Ralphsnyder v. Shaw*, 45 W. Va. 680; 31 S. E. 953; *Baum v.*

Baum, 109 Wis. 47; 53 L. R. A. 650; 85 N. W. 122.

² *Driscoll v. New Haven*, 75 Conn. 92; 52 Atl. 618.

³ *Casserleigh v. Wood*, 119 Fed. 308.

¹ If by statute she would be bound by a contract to sell realty if acknowledged for recordation, such relief cannot be given against her if such contract is not thus acknowledged. *Amick v. Ellis*, 53 W. Va. 421; 44 S. E. 257.

of sale made by trustees whose power is in doubt will not be enforced against them specifically.²

§1613. Contracts enforceable in equity but not at law.

There are, however, certain exceptions to the general rule that in order to have specific performance in equity the contract to be enforced must be enforceable at law. The rule that certain kinds of part performance may make an oral contract enforceable, though of a class which by the terms of the statute of frauds must be proved by written evidence has already been discussed.¹ Part performance is in most jurisdictions exclusively a doctrine of equity, without any effect at law. In such jurisdictions technical part performance of an oral contract which is included in the terms of the statute of frauds makes such contract enforceable in equity but not at law. In other cases the very fact that makes the contract unenforceable at law gives equity jurisdiction to enforce the contract specific. Thus at Common Law intermarriage of the parties to a contract operated as a discharge.² Accordingly, executory ante-nuptial contracts were discharged by the marriage of the parties. In such cases equity would grant specific performance.³

§1614. Breach and performance.

The ordinary rules that apply to breach and performance at law apply with especial force in equity. To obtain specific performance, there must have been some breach which causes actual damage. Thus specific performance cannot be given of a contract to effect insurance where the suit is brought after the loss, and other insurance on the same property has already been collected exceeding the value of the property insured.¹ The rules in force at law as to the necessity of complete per-

² Baltimore, etc., Ry. v. Winslow. (Mass.) 187; 81 Am. Dec. 742; 188 U. S. 646. Thompson v. Tucker-Osborn, 111

¹ See § 717 *et seq.*

Mich. 470; 69 N. W. 730.

² See § 1369.

¹ Ins. Co. v. Schall, 96 Md. 225;

³ Sullings v. Richmond, 5 All. 61 L. R. A. 301; 53 Atl. 925.

formance of all precedent and concurrent conditions by the party seeking relief apply with even greater force if specific performance is sought. The party seeking relief must have performed in full, unless some lawful excuse for non-performance exists.² Thus a vendee who has agreed to pay cash cannot have specific performance if he has tendered a note and a certificate of deposit instead.³ So a vendor who has agreed either expressly or by implication to furnish a good title, cannot have specific performance if the title to the realty is defective,⁴ or is even doubtful.⁵ Thus he cannot have specific performance if the assent of a third person, which has not been given, is necessary to make perfect title.⁶ Thus if the realty is contracted for as bounded by a street, and the owner of the land on which such street is to be located refuses to dedicate it, the vendor cannot have specific performance.⁷ To prevent specific performance, however, there must be a real risk, and not the mere possibility of one.⁸

§1615. Want of mutuality.

In many cases, and in varying forms, the courts have said that specific performance will be denied in contracts where mutuality is lacking.¹ The term "mutuality," however, is a

² *Boone v. Iron Co.*, 17 How. (U. S.) 340; *Wescott v. Mulvane*, 58 Fed. 305; 7 C. C. A. 242; *Costello v. Friedman*, — Ariz. —; 71 Pac. 935; *Work v. Welsh*, 160 Ill. 468; 43 N. E. 719; *Cohn v. Mitchell*, 115 Ill. 124; 3 N. E. 420; *Wilkin v. Voss*, 120 Ia. 500; 94 N. W. 1123; *Williams v. Hart*, 116 Mass. 513; *Hallmann v. Conlon*, 143 Mo. 369; 45 S. W. 275; *Fisher v. Buchanan*, 2 Neb. Unofficial 158; 96 N. W. 339; *English v. Milligan*, 27 Neb. 326; 43 N. W. 120; *Ocean City Association v. Headley*, 62 N. J. Eq. 322; 50 Atl. 78; *Kirby v. Harrison*, 2 O. S. 326; 59 Am. Dec. 677; *Bodwell v. Bodwell*, 66 Vt. 101; 28 Atl. 870.

³ *Wilkin v. Voss*, 120 Ia. 500; 94 N. W. 1123.

⁴ *Meshew v. Southworth*, — Mich. —; 94 N. W. 1047.

⁵ *Richards v. Knight*, 64 N. J. Eq. 196; 53 Atl. 452; *Zane v. Weintz*, — N. J. Eq. —; 55 Atl. 641.

⁶ *Cleveland v. Improvement Co.*, — N. J. Eq. —; 55 Atl. 117.

⁷ *Cleveland v. Improvement Co.*, — N. J. Eq. —; 55 Atl. 117.

⁸ *Grasser v. Blank*, 110 La. 493; 34 So. 648.

¹ *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; *Glass v. Rowe*, 103 Mo. 513; 15 S. W. 334; *Bodine v. Glading*, 21 Pa. St.

vague term, of more than one meaning, and covering a group of more or less vague ideas. The accurate statement of the meaning of this rule presents therefore two difficulties: (1) the difficulty of determining exactly what the term "mutuality" includes; and, (2) the conflict of authority as to whether in order to defeat specific performance mutuality must be lacking when the contract is entered into, or when the suit for specific performance is brought. Cases involving questions of mutuality may with some accuracy be distributed under two heads: those involving mutuality of obligation of the contract, and those involving mutuality of remedy. In order to have specific performance, the contract sued on must have mutuality of obligation, that is, the contract must be binding on both parties.² According to the weight of authority mutuality may arise after the contract is made.³ No objection which has been eliminated before the action was brought can prevent specific performance.⁴ It will be noted, however, in the following sections, that some courts repudiate this view and hold that the facts existing when the contract is entered into must be relied upon to determine specific performance. Performance may, as at law, be excused by the fact that the party against whom relief is sought has repudiated the contract.⁵ So on repudiation by the vendor, specific performance may be decreed against him before the time fixed by the contract for performance.⁶ On the other hand, a vendee who has announced that he would not perform, cannot subsequently have specific performance against the vendor who has acquiesced in such breach and has

50; 59 Am. Dec. 749; De Cordova v. Smith, 9 Tex. 129; 58 Am. Dec. 136; Moore v. Fitz Randolph, 6 Leigh (Va.) 175; 29 Am. Dec. 208.

² Robinson v. Appleton, 124 Ill. 276; 15 N. E. 761.

³ Thurber v. Meves, 119 Cal. 35; 50 Pac. 1063; 51 Pac. 536; Hall v. Center, 40 Cal. 63; Topeka Water-Supply Co. v. Root, 56 Kan. 187; 42 Pac. 715.

⁴ Rank v. Garvey, — Neb. —; 92 N. W. 1025.

⁵ Cheney v. Libby, 134 U. S. 68; Blanton v. Warehouse Co., 120 Fed. 318; Scott v. Beach, 172 Ill. 273; 50 N. E. 196; Veeder v. McMurray, 70 Ia. 118; 29 N. W. 818; Tyler v. Onzite, 93 Ky. 331; 20 S. W. 256; Tobin v. Larkin, 183 Mass. 389; 67 N. E. 340; McCormick v. Hickey, 56 N. J. Eq. 848; 42 Atl. 1019; McPherson v. Fargo, 10 S. D. 611; 66 Am. St. Rep. 723; 74 N. W. 1057.

⁶ Payne v. Melton, 67 S. C. 233; 45 S. E. 154.

made improvements on the property and has leased it to others.⁷

§1616. Mutuality involving offer and acceptance.

In considering first the types of so called contract, in which mutuality of obligation is lacking, it is evident that if an offer has not been accepted there is really no contract, and hence no remedy will be given either in law or in equity.¹ So if certain terms are left open for future negotiation the contract is not complete and no relief, least of all specific performance, can be given.² Classes of cases presenting these as the controlling facts, are often classed as illustrations of lack of mutuality. If a gratuitous option has been given by defendant to plaintiff, and such option has not been turned into a binding contract by acceptance, specific performance thereof cannot be enforced. Thus a promise to convey realty by the terms of which the vendee has the option to accept and pay for the property, or to refuse it and relieve himself from all liability does not impose any liability on the vendee and hence none on the vendor.³ So a promise to buy corporate stock, which the vendor is not obliged to sell unless he wishes, is not binding on the vendor and hence not on the vendee.⁴ So a contract of sale, by which the vendee is to pay for the property in fifteen days or give up his rights under the contract and permit the property to be resold is not binding on the vendee, and hence not upon the vendor.⁵ So an agreement to subscribe to corporate stock if a railroad should be incorporated, which imposes no obligation to incorporate, lacks mutuality.⁶ In such cases the party who is not bound in terms cannot compel specific performance against the adversary party, if the latter

⁷ Hapwood v. McCausland, 120 Ia. 218; 94 N. W. 469.

¹ Fisher v. Buchanan, 2 Neb. Un official 158; 96 N. W. 339; Kennedy v. Parmelee (Neb.), 91 N. W. 490.

² Lasher v. Gardner, 124 Ill. 441; 16 N. E. 919.

³ Goodale v. Hill, 42 Conn. 311; Winter v. Trainor, 151 Ill. 191; 37 N. E. 869; Graybill v. Brugh, 89

Va. 895; 37 Am. St. Rep. 894; 21 L. R. A. 133; 17 S. E. 558.

⁴ Hissam v. Parrish, 41 W. Va. 686; 56 Am. St. Rep. 892; 24 S. E. 600.

⁵ Bodine v. Glading, 21 Pa. St. 50; 59 Am. Dec. 749.

⁶ Strasburg Ry. v. Echternacht, 21 Pa. St. 220; 60 Am. Dec. 49.

has repudiated the contract before definite acceptance by the former. If, however, such option is given for a valuable consideration, it cannot be withdrawn during the time stipulated for, and on acceptance within the time limited, specific performance may be decreed in a proper case.⁷ If the option is given for valuable consideration it is held that if accepted within the time limited specific performance may be given, even if before acceptance the vendor has attempted to withdraw the offer by sale to a third person who has notice of the vendee's interests.⁸ If a gratuitous option has been accepted before it is withdrawn, the original offer is turned into a contract which may be enforced specifically if it possesses the elements requisite thereto.⁹ Thus election to exercise an option to purchase,¹⁰ or to repurchase¹¹ realty, or election to exercise an option to buy stock,¹² each makes the original unenforceable offer a valid contract and eliminates the want of mutuality. So if an offer and acceptance cannot be shown from the entire contract between the parties specific performance may be given, even if it is not embodied in one instrument.¹³ If the offer

⁷ Mathews Slate Co. v. Slate Co., 122 Fed. 972; Calanchini v. Branstetter, 84 Cal. 249; 24 Pac. 149; Hamilton v. Hamilton, — Ind. —; 70 N. E. 535; Bacon v. Ry., 95 Ky. 373; 25 S. W. 747.

⁸ Black v. Maddox, 104 Ga. 157; 30 S. E. 723.

⁹ Ross v. Parks, 93 Ala. 153; 30 Am. St. Rep. 47; 11 L. R. A. 148; 8 So. 368; Sayward v. Houghton, 119 Cal. 545; 51 Pac. 853; 52 Pac. 44; Black v. Maddox, 104 Ga. 157; 30 S. E. 723; French v. National Bank, 179 Mass. 404; 60 N. E. 793; Warren v. Costello, 109 Mo. 338; 32 Am. St. Rep. 669; 19 S. W. 29; Ide v. Leiser, 10 Mont. 5; 24 Am. St. Rep. 17; 24 Pac. 695; Tidball v. Chalbue, — Neb. —; 93 N. W. 679; Donahue v. Potter & George Co., 63 Neb. 128; 88 N. W. 171; Bigler v.

Baker, 40 Neb. 325; 24 L. R. A. 255; 58 N. W. 1026; Woodruff v. Woodruff, 44 N. J. Eq. 349; 1 L. R. A. 380; 16 Atl. 4; Hawralty v. Warren, 18 N. J. Eq. 124; 90 Am. Dec. 613; Bradford v. Foster, 87 Tenn. 4; 9 S. W. 195; Cherry v. Smith, 3 Humph. (Tenn.) 19; 39 Am. Dec. 150; Barrett v. McAllister, 33 W. Va. 738; 11 S. E. 220; Weaver v. Burr, 31 W. Va. 736; 3 L. R. A. 94; 8 S. E. 743.

¹⁰ Bigler v. Baker, 40 Neb. 325; 24 L. R. A. 255; 58 N. W. 1026.

¹¹ Woodruff v. Woodruff, 44 N. J. Eq. 349; 1 L. R. A. 380; 16 Atl. 4.

¹² Sayward v. Houghton, 119 Cal. 545; 51 Pac. 853; 52 Pac. 44.

¹³ Gates v. Dudgeon, 173 N. Y. 426; 93 Am. St. Rep. 608; 66 N. E. 116.

contemplates or permits acceptance by acts instead of a specific acceptance by words, such form of acceptance eliminates want of mutuality and makes the contract specifically enforceable.¹⁴ Thus A agreed to give to B a lease for producing oil and gas if B would drill a well upon the realty to be leased. By the terms of the agreement B was not required to drill such well, but he nevertheless did so. B was thereupon allowed specific performance against A.¹⁵ The view that acceptance of an option makes a contract which may be enforced specifically, assumes, of course, that, in this class of cases, at least, original want of mutuality may be eliminated by subsequent acts of the parties at some time between the date of the original promise and the bringing of the suit. This view must necessarily be taken unless we are to hold that specific performance can be given only when acceptance occurs at the same time as the offer. Many courts which take this view go a little further and hold that the filing of a bill for specific performance is sufficient as an acceptance to make the option into an enforceable contract.¹⁶ In other cases it seems to be held that an option not originally enforceable cannot by subsequent acceptance become enforceable in a suit for specific performance.¹⁷

¹⁴ *Storm v. United States*, 94 U. S. 76; *Welch v. Whelpley*, 62 Mich. 15; 4 Am. St. Rep. 810; 28 N. W. 744; *Smith v. Gibson*, 25 Neb. 511; 41 N. W. 360; *Boyd v. Brown*, 47 W. Va. 238; 34 S. E. 907. "Want of mutuality is no defense even in an action of specific performance where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms." Syllabus of *Bigler v. Baker*, 40 Neb. 325; 24 L. R. A. 255; 58 N. W. 1026; quoted in *Rank v. Garvey*, — Neb. —; 92 N. W. 1025.

¹⁵ *Boyd v. Brown*, 47 W. Va. 238; 34 S. E. 907.

¹⁶ *Woodruff v. Woodruff*, 44 N. J. Eq. 349; 1 L. R. A. 380; 16 Atl. 4.

"The filing of the bill for specific performance itself supplied the element of mutuality if it was theretofore wanting." *Black v. Maddox*, 104 Ga. 157, 165; 30 S. E. 723. "When such contracts come to be enforced in equity they cease to be unilateral, for upon the filing of the bill the party who was before unbound puts himself under the obligation of the contract. By his own act he makes the contract mutual and the other party is enabled to enforce it." *Richards v. Green*, 23 N. J. Eq. 536, 537; quoted in *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 355; 1 L. R. A. 380; 16 Atl. 4.

¹⁷ *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370; 7 Am. Dec. 484.

In some of the cases which seem to support this view, however, the contract is oral, and the question of part performance enters in.¹⁸

§1617. Mutuality involving want of consideration.

A promise not under seal is unenforceable unless supported by a valuable consideration.¹ No remedy for such promise is given, either at law or equity, and accordingly specific promise is denied.² If a contract is made by mutual executory promises, the same promise which forms the consideration forms also the acceptance of the other promise. In cases of this sort, therefore, offer and acceptance and consideration happen to consist in one and the same act. They are classed by many courts as cases in which specific performance is denied because of a want of mutuality.

§1618. Mutuality involving abnormal status of plaintiff.

One party to a contract may, by reason of abnormal status, have the right of avoiding the contract, if he sees fit so to do. At law, as we have seen,¹ this is a privilege personal to the party of abnormal status, and the defense of incapacity cannot be set up by the party of normal status. The only exception to this may be found in cases where the promise by the person of abnormal status is absolutely a nullity, and not merely voidable at his election.² There is a conflict of authority in equity, whether the party of abnormal status may have specific performance against a party of abnormal status if the former wishes to enforce the contract. In some states it is held that since the party of abnormal status could have avoided the contract could he have seen fit to do so, equity should not give the relief of specific performance to him as against the adversary party.³ So no specific performance can be given of cove-

¹⁸ *Stanton v. Singleton*, 126 Cal. 657; 47 L. R. A. 334; 59 Pac. 146; *Ducie v. Ford*, 8 Mont. 233; 19 Pac. 414.

¹ See § 273.

² *Warren v. Costello*, 109 Mo. 338; 32 Am. St. Rep. 669; 19 S. W. 29.

¹ See §§ 884 *et seq.*, 900, 907.

² See §§ 911, 931, 936.

³ *Infancy. Flight v. Bolland*, 4

nants made in consideration of executory *ultra vires* promises by a corporation.⁴ In other jurisdictions in equity it seems to be held that if the party of abnormal status does not seek to avoid the contract, but to enforce it, the defense of his incapacity cannot be set up by the adversary party in equity, since it might not be so set up at law. An additional complication is found in cases of this sort where the party of abnormal status has fully performed all the terms of the contract on his part to be performed. In many jurisdictions performance by him is held to eliminate the question of a want of mutuality, and to make it proper for the court to enforce the contract specifically against the adversary party.⁵ If a contract is made by an agent in excess of his authority, and his principal subsequently ratifies, the question of his right to enforce specific performance against the adversary party presents a conflict of authority.⁶

§1619. Mutuality where performance optional.

If performance of a contract by one party is not compulsory, but is only to be rendered in case of his election so to do, specific performance cannot be enforced against him as long as he has not made his election to perform; since this would be denying to him a right which, by the terms of the contract, he has reserved. So specific performance cannot be given of a

Russ, 298. Coverture. Warren v. Costello, 109 Mo. 338; 32 Am. St. Rep. 669; 19 So. 29. (Want of acceptance and want of consideration are also facts preventing specific performance in this case.) Richards v. Green, 23 N. J. Eq. 536; Shenandoah Valley R. R. v. Dunlop, 86 Va. 346; 10 S. E. 239. If the married woman is bound by her contract under the statute in force, she may, of course, have specific performance. Moore v. Baker, — N. J. Eq. —; 55 Atl. 106.

⁴ Railroad Co. v. Telegraph Co., 38 O. S. 24.

⁵ Infant. Yerkes v. Richards, 153 Pa. St. 646; 34 Am. St. Rep. 721; 26 Atl. 221. *Feme covert*. Richards v. Doyle, 36 O. S. 37; 38 Am. Rep. 550; Shenandoah Valley R. R. v. Dunlop, 86 Va. 346; 10 S. E. 239.

⁶ That the principal can have specific performance. Rank v. Garvey, — Neb. —; 92 N. W. 1025. That the principal cannot have specific performance. Atlee v. Bartholomew, 69 Wis. 43; 2 Am. St. Rep. 103; 33 N. W. 110.

contract the performance of which is optional with both parties.¹ According to many authorities he cannot have specific performance against the adversary party before such election is made by him, since he may afterward elect not to perform, and thus leave the adversary party without right or remedy.² So a party who has the right to end the contract on ten days' notice,³ or a year's notice,⁴ or who is bound to perform only as long as he is the agent of the Associated Press, no provision of the contract requiring him to act as such agent for any period of time,⁵ can none of them have specific performance against the adversary party. If, however, the party to whom the election is given has elected to perform, and has performed, it is held that the want of mutuality is thereby eliminated, and that he may then have specific performance in proper cases against the adversary party. Like results follow where performance is expressly made conditional on some event outside the contract. Thus if A agrees to sell realty to X on condition that A's co-owner B shall sell his interest to X, X cannot have specific performance against A if B refuses to sell.⁶ So if A and B enter into an agreement which cannot be performed unless A succeeds in buying a railroad at a sheriff's sale, A cannot have specific performance against B.⁷

§1620. Mutuality involving the Statute of Frauds.

By the statute of frauds the contract or memorandum is to be signed by the party to be charged therewith. Nothing is said about signature by both parties. Accordingly, in many cases it has been held that equity will give specific relief against the party who has signed the contract at the instance

¹ Tryce v. Dittus, 199 Ill. 189; 65 N. E. 220.

² Federal Oil Co. v. Oil Co., 121 Fed. 674; 57 C. C. A. 428; affirming, 112 Fed. 373.

³ Brooklyn Baseball Club v. McGuire, 116 Fed. 782. (Negative relief sought by injunction.)

⁴ Marble Co. v. Ripley, 10 Wall. (U. S.) 339.

⁵ Iron Age Publishing Co. v. Telegraph Co., 83 Ala. 498; 3 Am. St. Rep. 758; 3 So. 449.

⁶ Hoctor-Johnson Co. v. Billings, 65 Neb. 214; 91 N. W. 183.

⁷ Ballou v. March, 133 Pa. 31. 64; 19 Atl. 304.

of the party who has not signed it.¹ A reason given for this position by some courts is that by filing a bill for specific performance the plaintiff has made the contract enforceable as against himself, and has thereby eliminated the want of mutuality. It might be suggested, however, that in giving specific performance in this class of cases the courts were simply complying with the statute of frauds, which does not make such contracts illegal, void, or voidable, but simply makes them impossible of proof in an action against a party who has not signed a written contract or memorandum as provided by statute. In other jurisdictions, by a sort of judicial legislation, an addition has been made to the terms of the statute, and it has been held that whatever the rights of the parties at law, equity will not grant specific performance against the party who signed the written contract or memorandum at the instance of the party who did not sign them, since the contract could not have been enforced as against the latter. Part performance of an oral contract to sell realty renders it mutual.²

§1621. Mutuality of remedy.—Where requisite.

The original rule seems to have been that to allow specific performance there must be mutuality both of obligation and of remedy, as long as the contract was executory on both sides.¹ This rule is often repeated by modern courts.² It has been

¹ *Ide v. Leiser*, 10 Mont. 5; 24 Am. St. Rep. 17; 24 Pac. 695; *Hickey v. Dole*, 66 N. H. 336; 49 Am. St. Rep. 614; 21 Atl. 792; *Ives v. Hazard*, 4 R. I. 14; 67 Am. Dec. 500; *McPherson v. Fargo*, 10 S. D. 611; 65 Am. St. Rep. 723; 74 N. W. 1057.

² *Cobban v. Hecklen*, 27 Mont. 245; 70 Pac. 805.

¹ *Smith v. McVeigh*, 11 N. J. Eq. 239; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 274; 7 Am. Dec. 427; *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370; 7 Am. Dec. 484.

² *Chadwick v. Chadwick*, 121 Ala.

580; 25 So. 631; *Iron Age Publishing Co. v. Telegraph Co.*, 83 Ala. 498; 3 Am. St. Rep. 758; 3 So. 449; *Irwin v. Bailey*, 72 Ala. 467; *Welty v. Jacobs*, 171 Ill. 624; 40 L. R. A. 98; 49 N. E. 723; *Kansas, etc., Co. v. Ry.*, 135 Mass. 34; 46 Am. Rep. 439; *Ballou v. March*, 133 Pa. St. 64; 19 Atl. 304; *Hissam v. Parrish*, 41 W. Va. 686; 56 Am. St. Rep. 892; 24 S. E. 600. "It is settled law that a contract will not be specifically enforced unless its character be such that either party to it could have it specifically enforced as against the other." *Stanton v.*

said that lack of "mutuality of remedy,"³ "no matter from what cause,"⁴ will defeat specific performance. In many of these cases, however, the remedy has been lacking either because the obligation of the contract is voidable at the election of one party, or because the obligation has been entirely lacking. In either of these cases the real lack of mutuality has been in the obligation. Still in some of the cases the obligation is undoubtedly mutual, and specific performance is refused only because the remedy of specific performance is not mutually available. Thus a railway company contracted with a construction company to deliver certain stock certificates to the latter, in consideration whereof the latter was to build a railway line for the former in another state. It was held that as specific performance against the construction company would be impracticable, such company could not have specific performance against the railway.⁵ So where A agreed to lease his theatre to B for the production therein by B of a spectacular play, the receipts from admissions to be divided, it was held that as B could not be compelled to perform specifically, he could not have this remedy against A.⁶ So as a contract to support one as a member of one's family cannot be enforced specifically against the promisor, it has been held that the promisor cannot have specific performance against the adversary party of a contract to make a conveyance in consideration of such support.⁷ The rule that mutuality of remedy is necessary works both ways. In the cases thus far discussed the

Singleton, 126 Cal. 657, 663; 47 L. R. A. 334; 59 Pac. 146; *Banbury v. Arnold*, 91 Cal. 606; 27 Pac. 934; *Wakeham v. Baker*, 82 Cal. 46; *Anson v. Townsend*, 73 Cal. 415; 15 Pac. 49. "The doctrine is well established as applicable to suits for specific performance, that though no difficulty attend the execution of the contract on the part of the defendant, yet, unless there be mutuality as to the remedy as well as the obligation, so that the complainant in case of his defection could be com-

pelled to perform, the parties will be left to other remedies." *Chadwick v. Chadwick*, 121 Ala. 580, 583; 25 So. 631.

³ *Cooper v. Pena*, 21 Cal. 404.

⁴ *Stanton v. Singleton*, 126 Cal. 657, 663; 59 Pac. 146.

⁵ *Kansas, etc., Co. v. Ry.*, 135 Mass. 34; 46 Am. Rep. 439.

⁶ *Welty v. Jacobs*, 171 Ill. 624; 40 L. R. A. 98; 49 N. E. 723.

⁷ *Chadwick v. Chadwick*, 121 Ala. 580; 25 So. 631.

inability of one party to obtain the remedy has caused it to be denied to the adversary party. This rule is, however, sometimes invoked to give the remedy of specific performance of terms of a contract which by themselves would not justify specific performance because specific performance of the agreement of the adversary party which forms the consideration for such term sought to be enforced would be granted. Thus in most of the cases discussed under contracts for the sale of stock⁸ the vendee is seeking specific performance. Whether in cases where the vendee might have specific performance, the doctrine of mutuality requires equity to grant the same relief to the vendor on his application, is a question on which there is some conflict of authority. In some cases it is held that even if the vendor can be compensated fully for the loss occasioned by the vendee's breach, by money damages given in an action at law, nevertheless the fact that the vendee could have specific performance requires equity to grant the same relief to the vendee.⁹ So it is very generally assumed that under a contract for the sale of realty the vendor may have specific performance.

§1622. Mutuality of remedy.—Where not requisite.

In many states the doctrine that the remedy of specific performance must be mutual has been abandoned. Where this view is taken the fact that the contract could not have been enforced specifically against the party seeking specific performance does not of itself prevent him from obtaining it.¹ So under a contract whereby a husband agrees to convey certain realty to his wife on consideration that she will waive a ground for divorce and live with him, specific performance may be decreed, although the husband has no means of compelling her

⁸ See § 1630.

⁹ *Bumgardner v. Leavitt*, 35 W. Va. 194; 12 L. R. A. 776; 13 S. E. 67. So of the sale of a stock dividend. *Withy v. Cottle*, 1 Sim. & St. 174.

¹ *Lamphrey v. Ry.*, 89 Minn. 187;

94 N. W. 555; *Burns v. Smith*, 21 Mont. 251; 69 Am. St. Rep. 653; 53 Pac. 742; *Hickey v. Dole*, 66 N. H. 336; 49 Am. St. Rep. 614; 29 Atl. 792; *Northern Central Ry. v. Walworth*, 193 Pa. St. 207; 74 Am. St. Rep. 683; 44 Atl. 253.

to live with him always,² and so if when the contract was made the vendor could not have performed a minor stipulation of his contract specifically, but he has since acquired the property which he had agreed to deliver, and is in a position to perform specifically, and the vendee did not attempt to treat the contract as discharged for that reason.³ Thus it has been held that under a contract by A to convey realty to B in consideration of B's agreement to support A as a member of B's family, B may have specific performance during A's life.⁴ This principle, too, works both ways, and may be invoked to prevent one party from receiving the specific performance sought, even though the adversary party may have had such remedy.⁵ Thus A agreed to exchange certain stock for B's yacht. The stock could be bought readily in the open market. It was held that though A might, if he wished, have specific performance against B, B could not have such performance against A.⁶

§1623. Mutuality of remedy after performance by plaintiff.

Even in jurisdictions in which lack of mutuality of remedy is treated as a ground for refusing specific performance of a contract, executory on both sides, this rule has no application to contracts in which the provisions which could not be enforced specifically have been performed fully.¹ Thus contracts for personal care and attention or personal services cannot usually be enforced specifically. However, when personal care and attention,² or personal services,³ or services as an attorney,⁴ have

² *Moayon v. Moayon*. — Ky. —; 60 L. R. A. 415; 72 S. W. 33.

³ *Blanton v. Warehouse Co.*, 120 Fed. 318.

⁴ *Whitney v. Hay*, 181 U. S. 77.

⁵ *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404; 9 Atl. 626.

⁶ *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404; 9 Atl. 626.

¹ *Dickson v. Stewart*, — Neb. —; 98 N. W. 1085.

² *Stellmacher v. Bruder*, 89 Minn. 507; 95 N. W. 324; *Svanburg v. Fosseen*, 75 Minn. 350; 74 Am. St. Rep. 490; 43 L. R. A. 427; 78 N. W. 4.

³ *Thurber v. Meves*, 119 Cal. 35; 50 Pac. 1063; 51 Pac. 536.

⁴ *Howard v. Throckmorton*, 48 Cal. 482; *Ballard v. Carr*, 48 Cal. 74; *Topeka Water-Supply Co. v. Root*, 56 Kan. 187; 42 Pac. 715.

been performed fully specific performance may be given of remaining provisions of the contract.

III. SPECIAL REQUISITES FOR EQUITABLE RELIEF.

§1624. Discretionary nature of specific performance.

The fact that the contract for which specific performance was sought was enforceable at law was not of itself sufficient to warrant specific performance.¹ Specific performance is said to be discretionary with the chancellor and not a matter of course.² This, of course, means that the discretion spoken of is a judicial discretion controlled by the rules of equity, and not the mere arbitrary whim of the individual chancellor.³ It

¹ Kelly v. Ry., 74 Cal. 557; 5 Am. St. Rep. 470; 16 Pac. 386; Pinner v. Sharp, 23 N. J. Eq. 274; Friend v. Lamb, 152 Pa. St. 529; 34 Am. St. Rep. 672; 25 Atl. 577.

² Mason v. Armitage, 13 Ves. Jr. 25; Cheney v. Libby, 134 U. S. 68; Willard v. Tayloe, 8 Wall. (U. S.) 557; Washington Irrigation Co. v. Krutz, 119 Fed. 279; Kelly v. Ry., 74 Cal. 557; 5 Am. St. Rep. 470; 16 Pac. 386; Patterson v. Bloomer, 35 Conn. 57; 95 Am. Dec. 218; Ebert v. Arends, 190 Ill. 221; 60 N. E. 211; Mack v. McIntosh, 181 Ill. 633; 54 N. E. 1019; Minneapolis, etc., Ry. v. Cox, 76 Ia. 306; 14 Am. St. Rep. 216; 41 N. W. 24; Reid v. Mix, 63 Kan. 745; 55 L. R. A. 706; 66 Pac. 1021; Rogers v. Saunders, 16 Me. 92; 33 Am. Dec. 635; Graves v. Goldthwait, 153 Mass. 268; 10 L. R. A. 763; 26 N. E. 860; Rust v. Conrad, 47 Mich. 449; 41 Am. Rep. 720; 11 N. W. 265; Pomeroy v. Fullerton, 131 Mo. 581; 33 S. W. 173; Hoctor-Johnson Co. v. Billings, 65 Neb. 214; 91 N. W. 183; Johnson v. Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773; Winne v. Winne, 166 N.

Y. 263; 82 Am. St. Rep. 647; 59 N. E. 832; Stokes v. Stokes, 155 N. Y. 581; 50 N. E. 342; Whitted v. Fuquay, 127 N. C. 68; 37 S. E. 141; Datz v. Phillips, 137 Pa. St. 203; 21 Am. St. Rep. 864; 20 Atl. 426; Alexander v. McDaniel, 56 S. C. 252; 34 S. E. 405; Howard v. Moore, 4 Sneed (Tenn.) 317; Gish v. Jamison, 96 Va. 312; 31 S. E. 521; Menger v. Schulz, 28 Wash. 329; 68 Pac. 875; Knott v. Mfg. Co., 30 W. Va. 790; 5 S. E. 266; Engberry v. Rousseau, 117 Wis. 52; 93 N. W. 824.

³ McCabe v. Matthews, 155 U. S. 550; Rutland Marble Co. v. Ripley, 10 Wall. (U. S.) 339; Sturgis v. Galindo, 59 Cal. 28; 43 Am. Rep. 239; Maltby v. Thews, 171 Ill. 264; 49 N. E. 486; Mather v. Simonton, 73 Ind. 595; Grundy v. Edwards, 7 J. J. Mar. (Ky.) 368; 23 Am. Dec. 409; Jones v. Newhall, 115 Mass. 244; 15 Am. Rep. 97; Eckstein v. Downing, 64 N. H. 248; 10 Am. St. Rep. 404; 9 Atl. 626; Hayes v. Nourse, 114 N. Y. 595; 11 Am. St. Rep. 700; 22 N. E. 40; Friend v. Lamb, 152 Pa. St. 529; 34 Am. St.

has been observed that "a decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand, in view of all the circumstances of the case."⁴ In other words, in order to be enforced by specific performance, a contract must possess certain elements, to be described hereafter, which give equity jurisdiction and make this remedy appropriate. It must be fair and reasonable, definite, of such nature that compensation for breach cannot be made in money, and the party seeking relief must have acted promptly in seeking this relief. While a contract for the sale of realty is the one most likely to call forth a decree of specific performance, there is no arbitrary rule that requires equity to ignore the remaining circumstances of the case, even in contracts for the sale of realty.

§1625. Specific performance denied if causing great hardship.

The discretionary power of the chancellor in granting or denying specific performance is illustrated by the principle that if specific performance will work great hardship to the party against whom such relief is sought, it will be denied even if the other circumstances are such that it would ordinarily be granted.¹ Thus specific performance of a land contract was denied where the vendee was to survey the land at his own expense and pay a certain sum per acre therefor, and his sur-

Rep. 672; 25 Atl. 577; Davenport v. Latimer, 53 S. C. 563; 31 S. E. 630; Cocke v. Evans, 9 Yerg. (Tenn.) 287; Dewey v. Land Co., 98 Wis. 83; 73 N. W. 565. "This discretion, of course, is not an unlimited discretion, to be exercised without regard to those principles of equity by which the rights of the parties are to be determined, and a decree is not to be given or withheld arbitrarily and capriciously at the mere will of the judge who may be presiding in the cause; but it is a judicial discretion, to be controlled

and governed by the principles and rules of equity." Hootor-Johnson Co. v. Billings, 65 Neb. 214, 218; 91 N. W. 183.

⁴ McCabe v. Matthews, 155 U. S. 550, 553; citing Hennessy v. Woolworth, 128 U. S. 438; Willard v. Tayloe, 8 Wall. (U. S.) 557; Holt v. Rogers, 8 Pet. (U. S.) 420; Pratt v. Carroll, 8 Cranch (U. S.) 471.

¹ Federal Oil Co. v. Oil Co., 121 Fed. 674; 57 C. C. A. 428; affirming, 112 Fed. 373; Hapwood v. McCausland, 120 Ia. 218; 94 N. W. 469.

veyors had been stopped forcibly and his own life threatened.² Specific performance is more certainly refused where to grant it would be to work great hardship on an innocent third person.³ Thus A agreed to transfer a patent to B. Subsequently, before such transfer was made, and while A's experiments were in progress, A agreed to transfer an interest therein to X in consideration of X's furnishing ten thousand dollars to complete the patent. It was held that B could not have specific performance so as to defeat X's rights.⁴ On this principle equity denies specific performance as against a *bona fide* purchaser of the property contracted for. Facts which were considered by the parties when the contract was made cannot be invoked to establish hardship. The fact that the value of realty on which an option for valuable consideration has been given has increased greatly does not prevent specific performance, where the option fixed the purchase price, if exercised in ten years, at some fifty per cent more than the value of the property when it was given, thus showing that the chance of an increase in value was contemplated by the parties.⁵

§1626. Want of adequate remedy at law.

The original test for the power of equity to grant relief in any class of cases was the absence of a plain, adequate and complete remedy at law. This principle applies with especial force to suits for specific performance of a contract. If the remedy at law in the shape of an action for money damages is plain, adequate and complete, specific performance will be denied, no matter if the contract in question possess all the other elements requisite to such relief.¹ Hence if payments

² Williamson v. Dils, — Ky. —; 72 S. W. 292. Co., 168 U. S. 471; Union Pacific Ry. Co. v. Ry., 163 U. S. 564; American Fisheries Co. v. Lennen, 118

³ Booth v. Burdock, — Mich. —; 94 N. W. 177. Fed. 869; Andrew v. Babcock, 63

⁴ Booth v. Burdock, — Mich. —; 94 N. W. 177. Conn. 109; 26 Atl. 715; Canal Commissioners v. Chicago, 191 Ill. 326;

⁵ Willard v. Tayloe, 8 Wall. (U. S.) 557. 61 N. E. 71; Hull v. Hull, 117 Ia. 63; 90 N. W. 496; Maryland Clay

¹ Raton Water Works Co. v. Raton, 174 U. S. 360; Hyer v. Traction Co. v. Simpser, 96 Md. 1; 53 Atl. 424; Northern Trust Co. v. Markell,

are made on an overdue note under a contract to apply them on such note, equity will not enforce the application of such payments.² So the mere fact of payment of the consideration in advance,³ such as payment of rent in advance,⁴ is not ground for this form of equitable relief, as the law gives an adequate remedy. Conversely, if the remedy at law is not plain, adequate and complete, specific performance will be granted if the contract possesses the remaining elements already discussed,⁵ which make such remedy appropriate.⁶

§1627. Contracts for conveyance of realty.

Every tract of realty is in a way unique. No amount of money will enable one to acquire a given tract for a private purpose without the consent of the owner thereof. It follows that a contract to convey realty is one the breach of which cannot be compensated for adequately by money damages. Specific performance of such contracts is therefore regularly given by equity if the other elements of the contract are such as to make this remedy proper.¹ So specific performance is given of a

61 Minn. 271; 63 N. W. 735; Reed v. Reed, 94 Mo. App. 590; 68 S. W. 385; Rothholz v. Schwartz, 46 N. J. Eq. 477; 19 Am. St. Rep. 409; 19 Atl. 312; Johnson v. Wadsworth, 24 Or. 494; 34 Pac. 13; Rigg v. Ry., 191 Pa. St. 298; 43 Atl. 212; His-sam v. Parrish, 41 W. Va. 686; 56 Am. St. Rep. 892; 24 S. E. 600.

² Reed v. Reed, 94 Mo. App. 590; 68 S. W. 385.

³ Cooley v. Lobdell, 153 N. Y. 596; 47 N. E. 783; Duncel v. Duncel, 141 N. Y. 427; 36 N. E. 405; Winchell v. Winchell, 100 N. Y. 159; 2 N. E. 897; Odell v. Montross, 68 N. Y. 499; Miller v. Bell, 64 N. Y. 286.

⁴ Charlton v. Real Estate Co., 64 N. J. Eq. 631; 54 Atl. 444.

⁵ See §§ 1607-1623.

⁶ Stellmacher v. Bruder, 89 Minn.

507; 95 N. W. 324; Svanburg v. Fosseen, 75 Minn. 350; 74 Am. St. Rep. 490; 43 L. R. A. 427; 78 N. W. 4; Moayon v. Moayon, — Ky. —; 60 L. R. A. 415; 72 S. W. 33; Ralston v. Ihmsen, 204 Pa. St. 588; 54 Atl. 365.

¹ Willard v. Tayloe, 8 Wall. (U. S.) 557; Speer v. Craig, 16 Colo. 478; 27 Pac. 891; Harding v. Gibbs, 125 Ill. 85; 8 Am. St. Rep. 345; 17 N. E. 60; Throckmorton v. Davidson, 68 Ia. 643; 27 N. W. 794; Moayon v. Moayon, — Ky. —; 60 L. R. A. 415; 72 S. W. 33; Newbold v. Peabody Heights Co., 70 Md. 493; 3 L. R. A. 579; 17 Atl. 372; Wilkinson v. Kneeland, 125 Mich. 261; 84 N. W. 142; Svanburg v. Fosseen, 75 Minn. 350; 74 Am. St. Rep. 490; 43 L. R. A. 427; 78 N. W. 4; Gates v. Dudgeon, 173 N. Y.

contract to exchange realty,² or to rescind an exchange already made,³ or to lease realty,⁴ or to give a mortgage.⁵ This principle is not limited to contracts concerning corporeal realty, but extends also to contracts concerning easements,⁶ such as contracts concerning the right of way of a railroad,⁷ or a contract giving to one railroad the right to run trains over the road of another subject to the orders of officers of the latter,⁸ or to maintain and use a telegraph wire on the poles of another.⁹ In most of the cases discussed specific performance has been given at the instance of the vendee. Specific performance is also often given at the application of the vendor.¹⁰ This remedy is given even when it results in the specific performance of provisions which by themselves would not be thus enforced in equity. Thus specific performance has been given of a contract to construct and maintain a depot for freight and passengers upon the realty conveyed to the promisor in consideration of his promise and of which he has taken possession.¹¹

426; 93 Am. St. Rep. 608; 66 N. E. 116; *King v. Millard*, 15 R. I. 426; 7 Atl. 405; *Lothrop v. Marble*, 12 S. D. 511; 76 Am. St. Rep. 626; 81 N. W. 885; *Farrier v. Reynolds*, 88 Va. 141; 13 S. E. 393; *Camden v. Dewing*, 47 W. Va. 310; 81 Am. St. Rep. 797; 34 S. E. 911.

² *Union Pacific Ry. v. McAlpine*, 129 U. S. 305; *Purcell v. Miner*, 4 Wall. (U. S.) 513; *Cusack v. Budasz*, 187 Ill. 392; 58 N. E. 326; *Overstreet v. Rice*, 4 Bush. (Ky.) 1; 96 Am. Dec. 279; *Te Poel v. Shutt*, 57 Neb. 592; 78 N. W. 288.

³ *Boggs v. Bodkin*, 32 W. Va. 566; 5 L. R. A. 245; 9 S. E. 891.

⁴ *Hexter v. Pearce* (1900), 1 Ch. 341; *Moss v. Barton*, L. R. 1 Eq. 474; *Clark v. Clark*, 49 Cal. 586; *Switzer v. Gardner*, 41 Mich. 164; 2 N. W. 191; *Smith v. St. Philip's Church*, 107 N. Y. 610; 14 N. E. 825; *Wallace v. Scoggins*, 17 Or. 476; 21 Pac. 558; *Seaman v. Ascher-*

mann, 51 Wis. 678; 37 Am. Rep. 849; 8 N. W. 818.

⁵ *Hermann v. Hodges*, L. R. 16 Eq. 18; *Hicks v. Turck*, 72 Mich. 311; 40 N. W. 339; *Irvine v. Armstrong*, 31 Minn. 216; 17 N. W. 343; *Ogden v. Ogden*, 4 O. S. 182.

⁶ *Puttman v. Haltey*, 24 Ia. 425.

⁷ *Joy v. St. Louis*, 138 U. S. 1; *Cornwall, etc., Co.'s Appeal*, 125 Pa. St. 232; 17 Atl. 427.

⁸ *Union Pacific Ry. v. Ry.*, 163 U. S. 564; *Prospect Park, etc., R. R. v. Ry.*, 144 N. Y. 152; 26 L. R. A. 610; 39 N. E. 17.

⁹ *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459.

¹⁰ *Maryland Clay Co. v. Simpers*, 96 Md. 1; 53 Atl. 424; *Abbott v. Moldestad*, 74 Minn. 293; 73 Am. St. Rep. 348; 77 N. W. 227; *Anderson v. Mfg. Co.*, 30 Wash. 147; 70 Pac. 247.

¹¹ *Murray v. R. R.*, 64 S. C. 520; 42 S. E. 617.

§1628. Contract to make will.

A contract to make a will cannot be enforced in any way during the promisor's life if he has not repudiated the contract since he has the whole of his life in which to perform.¹ If the promisor repudiates the contract in his lifetime, specific performance in the strict sense of the term will not be given, but analogous relief will be given by declaring the promisor a trustee for the promisee as to the property contracted for.² If the promisor dies without making the will agreed upon, the contract is broken. Specific performance in the literal sense of the term cannot, of course, be given, but the promisor can have substantially the same relief in equity by having the heirs, devisees, next of kin and legatees held as trustees of the property contracted for.³ Such relief is given under a contract to

¹ Manning v. Pippen, 86 Ala. 357; 11 Am. St. Rep. 46; 5 So. 572. "Strictly speaking an agreement to dispose of property by will cannot be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; not after his death because it is no longer possible for him to make a will, yet courts of equity can do what is equivalent to a specific performance of such an agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representative or purchaser with notice of the agreement as the case may be." Burdine v. Burdine, 98 Va. 515, 519; 81 Am. St. Rep. 741; 36 S. E. 992.

² Duval v. Duval, 54 N. J. Eq. 581; 35 Atl. 750.

³ Townsend v. Vanderwerker, 160

U. S. 171; Brown v. Sutton, 129 U. S. 238; Owens v. McNally, 113 Cal. 444; 33 L. R. A. 369; 45 Pac. 710; Walters v. Walters, 132 Ill. 467; 23 N. E. 1120; Newton v. Lyon, 62 Kan. 306; 62 Pac. 1000; affirmed on rehearing, 62 Kan. 651; 64 Pac. 592; Carmichael v. Carmichael, 72 Mich. 76; 16 Am. St. Rep. 528; 1 L. R. A. 596; 40 N. W. 173; Stellmacher v. Bruder, 89 Minn. 507; 95 N. W. 324; Sharkey v. McDermott, 91 Mo. 647; 60 Am. Rep. 270; 4 S. W. 107; Kofka v. Rosicky, 41 Neb. 328; 43 Am. St. Rep. 685; 25 L. R. A. 207; 59 N. W. 788; Winne v. Winne, 166 N. Y. 263; 82 Am. St. Rep. 647; 59 N. E. 832; Spencer v. Spencer, 25 R. I. 239; 55 Atl. 637; Turnipseed v. Sirrine, 57 S. C. 559, 578; 76 Am. St. Rep. 580, 584; 35 S. E. 757; rehearing denied, 35 S. E. 1035; Brinton v. Van Cott, 8 Utah 480; 33 Pac. 218; Burdine v. Burdine, 98 Va. 515; 81 Am. St. Rep. 741; 36 S. E. 992; Hale v. Hale, 90 Va. 728; 19 S. E. 739.

make one an "heir" where this is held equivalent to a contract to make a will,⁴ or under a contract to adopt a child.⁵

§1629. Contracts for sale of interest in personalty.

Contracts for the sale of personal property which has a market value, which is bought and sold in open market, and which has no special or unique value, are generally such as can be compensated adequately by an action at law. The remedy at law is adequate, since with the unpaid purchase money and the damages recovered by action the vendee can buy in open market property of the same character as that contracted for, if the vendor is the party in default; while the vendor can sell his property in the market and the purchase price thus obtained, together with the damages recovered by action, will place him in the same situation as he would have been in had the vendee performed, where the vendee is in default. Specific performance is therefore denied in such cases.¹ There is, however, no arbitrary rule forbidding specific performance of contracts relating to personalty merely because it is personalty.² The reason for refusing in most cases to grant specific performance of contracts of this class is that the law gives an adequate remedy in damages, and wherever this reason fails the rule, too, fails.³ Among the classes of cases in which it is

⁴ *Winne v. Winne*, 166 N. Y. 263; 82 Am. St. Rep. 647; 59 N. E. 832.

⁵ *Nowack v. Berger*, 133 Mo. 24; 54 Am. St. Rep. 663; 31 L. R. A. 810; 34 S. W. 489.

¹ *McLaughlin v. Piatti*, 27 Cal. 451; *Dorman v. McDonald*, — Fla. —; 36 So. 52; *Carolee v. Handelis*, 103 Ga. 299; 29 S. E. 935; *Madison v. Chinn*, 3 J. J. Mar. (Ky.) 230; *Jones v. Newhall*, 115 Mass. 244; 15 Am. Rep. 97; *Ferguson v. Paschall*, 11 Mo. 267.

² "Notwithstanding this distinction between personal contracts for goods, and contracts for lands, is to be found laid down in the books as

a general rule, yet there are many cases to be found, where specific performance of contracts relating to personalty have been enforced in chancery; and courts will only weigh with greater nicety contracts of this description, than such as relate to lands." *Mechanics' Bank v. Seton*, 1 Peters (U. S.) 299, 304.

³ *McNamara v. Cattle Co.*, 105 Fed. 202; *Cowles v. Whitman*, 10 Conn. 121; 25 Am. Dec. 60; *Brady v. Yost*, 6 Ida. 273; 55 Pac. 542; *Parker v. Garrison*, 61 Ill. 250; *Gloucester, etc., Co. v. Cement Co.*, 154 Mass. 92; 26 Am. St. Rep. 214; 12 L. R. A. 563; 27 N. E. 1005;

held that the remedy at law for contracts for the sale of personalty is inadequate the following are the more important: The property contracted for may be necessary to enable the vendee to carry on his business, and may be very limited in quantity,⁴ or not to be obtained except from the vendor.⁵ So a contract to sell a certain quantity of wood pulp annually for a term of years has been enforced specifically, where the future price of the wood and the cost of obtaining it is uncertain, and it is difficult to estimate damages because of the chances of destruction of the timber by fire or possible action of the state in taking it by eminent domain.⁶ The personalty contracted for may have special value for evidentiary purposes, such as documents of different kinds.⁷ Deeds and muniments of title are the commonest examples of this class.⁸ This form of relief "that coerces the delivery of the instruments" has, however, been held to be of "nature dissimilar and separate" from specific performance.⁹ The personalty contracted for may have unique associations,¹⁰ as objects of historical interest,¹¹ as the Pusey Horn, which had gone with the estate of the plaintiff from time immemorial and by which such estate was held,¹²

Clark v. Flint, 22 Pick. (Mass.) 231; 33 Am. Dec. 733; St. David's Church v. Wood, 24 Or. 396; 41 Am. St. Rep. 860; 34 Pac. 18; Fowler v. Sands, 73 Vt. 236; 50 Atl. 1067; Stuart v. Pennis, 91 Va. 688; 22 S. E. 509; Young v. Porter, 27 Wash. 551; 68 Pac. 362.

⁴ Gloucester, etc., Co. v. Cement Co., 154 Mass. 92; 26 Am. St. Rep. 214; 12 L. R. A. 563; 27 N. E. 1005. (Fish-skins to make glue.) Vail v. Osburn, 174 Pa. St. 580; 34 Atl. 315 (tan-bark).

⁵ Equitable Gas Light Co. v. Mfg. Co., 63 Md. 285.

⁶ St. Regis Paper Co. v. Lumber Co., 173 N. Y. 149; 65 N. E. 967. (In this case, however, the pulp was to be made from timber growing on a specific tract, and the contract

was therefore looked upon as one involving an interest in realty.)

⁷ Clarke v. White, 12 Pet. (U. S.) 178; McGowin v. Remington, 12 Pa. St. 56; 51 Am. Dec. 584.

⁸ Williams v. Carpenter, 14 Colo. 477; 24 Pac. 558; Cowles v. Whitman, 10 Conn. 121; 25 Am. Dec. 60; Hill v. Bank, 44 N. H. 567; Pattison v. Skillman, 34 N. J. Eq. 344; Baum's Appeal, 113 Pa. St. 58; 4 Atl. 461.

⁹ Clarke v. White, 12 Pet. (U. S.) 178, 187.

¹⁰ Lowther v. Lowther, 13 Ves. Jr. 95; Caldwell v. Myers, Hard. (Ky.) 551; Womack v. Smith, 11 Humph. (Tenn.) 478; 54 Am. Dec. 51.

¹¹ Pusey v. Pusey, 1 Vern. 273.

¹² Pusey v. Pusey, 1 Vern. 273.

or an altar piece, which had been part of the estate of the Pereys, and which the Duke of Somerset had acquired as treasure-trove,¹³ or family heirlooms.¹⁴ A stock of goods connected with an existing business has an especial and peculiar value in connection with the transfer of such business. So a contract to sell an entire stock of goods¹⁵ or to sell an interest in a partnership¹⁶ has been specifically enforced. Specific performance of a contract by a partnership to convey its property to a corporation organized to continue its business has been given against a member of such firm.¹⁷ Specific performance has been given of a contract to mortgage specific personalty, such as growing crops.¹⁸

§1630. Contracts for sale of corporate stock.

Contracts for the sale of corporate stock are controlled by the same principles as those applying to sales of other personal property in general. If the stock is one which is regularly bought and sold, it is easy to estimate in money the damages sustained from the breach. The vendee can then with the unpaid purchase money and the damages thus recovered purchase in open market an amount of stock equal to that contracted. In such cases the remedy at law is adequate, and in the absence of special circumstances specific performance will not be decreed.¹ To obtain specific performance it must be shown further that special circumstances exist which make the

¹³ (Duke of) Somerset v. Cookson, 3 P. Wms. 389.

¹⁴ Arundell v. Phipps, 10 Ves. Jr. 139.

¹⁵ Raymond Syndicate v. Brown, 124 Fed. 80.

¹⁶ Ralston v. Ihmsen, 204 Pa. St. 588; 54 Atl. 365.

¹⁷ Coggsell, etc., Co. v. Coggsell (N. J. Eq.), 40 Atl. 213.

¹⁸ Sporer v. McDermott, — Neb. —; 96 N. W. 232, 659; Ryan v. Donley, — Neb. —; 96 N. W. 234.

¹ White & Tud. Cas. 907; Cappur v. Harris, Bunbury, 135; Treat v. Richardson, 47 Conn. 582; Cohn v. Mitchell, 115 Ill. 124; 3 N. E. 420; Pierce v. Plumb, 74 Ill. 326; Ryan v. McLane, 91 Md. 175; 80 Am. St. Rep. 438; 50 L. R. A. 501; 46 Atl. 340; Kimball v. Morton, 5 N. J. Eq. 26; 43 Am. Dec. 621; Foll's Appeal, 91 Pa. St. 434; 36 Am. Rep. 671; Ewing v. Litchfield, 91 Va. 575; 22 S. E. 362; Avery v. Ryan, 74 Wis. 591; 43 N. W. 317.

¹ Cud v. Rutter, 1 P. Wms. 570;

remedy at law inadequate.² What these facts are is a question upon which the courts are not entirely harmonious. There is perhaps a tendency at Modern Law to a greater liberality in granting specific performance.³ If the specific stock contracted for has a special and unique value to the purchaser for which money damages will not compensate him, it is said that specific performance will be given.⁴ The motive which often gives a unique value to a certain stock is the desire to control the corporation; and equity holds that this is not such a circumstance as to make specific performance proper.⁵ Indeed, this fact has been said to negative the propriety of specific performance on the ground that such a contract is contrary to public policy.⁶ However, a contract intended to give the vendee one half the entire stock of the corporation has been enforced specifically,⁷ as has a contract for the sale of stock of no ascertained value which will give to the vendee the control of the corporation.⁸ Practicability in ascertaining damages has been suggested in many cases as a sufficient test, specific performance being refused if it is practicable to estimate the damages in money,⁹ while if impracticable specific performance is given.¹⁰ Thus if the value

² *Williamson v. Krohn*, 66 Fed. 655; 13 C. C. A. 668; affirming, *Krohn v. Williamson*, 62 Fed. 869; *Goodwin, etc., Co.'s Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696; 12 Atl. 736; *Manton v. Ray*, 18 R. I. 672; 49 Am. St. Rep. 811; 29 Atl. 998.

³ *Krohn v. Williamson*, 62 Fed. 869.

⁴ *Bomeisler v. Forster*, 154 N. Y. 229; 39 L. R. A. 240; 48 N. E. 534; *Cushman v. Mfg. Co.*, 76 N. Y. 365; 32 Am. Rep. 315; *Bumgardner v. Leavitt*, 35 W. Va. 194; 12 L. R. A. 776; 13 S. E. 67.

⁵ *Gage v. Fisher*, 5 N. D. 297; 31 L. R. A. 557; 65 N. W. 809; *Foll's Appeal*, 91 Pa. St. 434; 36 Am. Rep. 671.

⁶ *Foll's Appeal*, 91 Pa. St. 434;

36 Am. Rep. 671 (national bank stock).

⁷ *O'Neill v. Webb*, 78 Mo. App. 1.

⁸ *Rumsey v. R. R.*, 203 Pa. St. 579; 53 Atl. 495.

⁹ *Barton v. De Wolf*, 108 Ill. 195; *Northern Trust Co. v. Markell*, 61 Minn. 271; 63 N. W. 735; *Rigg v. Ry.*, 191 Pa. St. 298; 43 Atl. 212; *Hissam v. Parish*, 41 W. Va. 686; 56 Am. St. Rep. 892; 24 S. E. 600.

¹⁰ *Newton v. Wooley*, 105 Fed. 541; *Fleishman v. Woods*, 135 Cal. 256; 67 Pac. 276; *Baldwin v. Commonwealth*, 11 Bush. (Ky.) 417; *Northern Central Ry. v. Walworth*, 193 Pa. St. 207; 74 Am. St. Rep. 683; 44 Atl. 253; *Manton v. Ray*, 18 R. I. 672; 49 Am. St. Rep. 811; 29 Atl. 998.

of the stock is uncertain,¹¹ as where it has never been sold on the market,¹² specific performance will be given. It has, on the other hand, been held that the fact that the stock is seldom offered for sale,¹³ or has no market value and is not quoted in commercial circles,¹⁴ is not of itself ground for specific performance if it is in fact easy to ascertain the damages. A mere dispute as to the value of the stock is not sufficient to show that its value is so uncertain that damages cannot be estimated.¹⁵ Even if the stock is rarely offered for sale or sold, and if the vendee may not be able to buy it, it must be further shown that he wishes the specific stock.¹⁶ The fact that the value of the stock fluctuates is a circumstance strongly tending to show that its value is uncertain and hence that specific performance should be given.¹⁷ The facility with which the vendee can buy the stock contracted for, in the open market, is an important element in determining the propriety of granting specific performance. The fact that the amount of the stock for sale is limited and that it will be impossible or difficult for the vendee to buy the specific stock in open market, even if he receives money damages, is a circumstance often relied upon in granting this relief.¹⁸ In some of the earlier cases it seems to be assumed that the fact that law cannot give the specific stock, but only money damages, is sufficient to justify equity in granting specific performance.¹⁹ Circumstances apart from the nature of the stock contracted for may make specific performance proper. Thus if the party who agrees to transfer the stock holds it in trust for the party to whom he agrees to transfer it,²⁰ as where the transferee has furnished

¹¹ *Manton v. Ray*, 18 R. I. 672; 49 Am. St. Rep. 811; 29 Atl. 998. 248; 10 Am. St. Rep. 404; 9 Atl. 626.

¹² *New England Trust Co. v. Abbott*, 162 Mass. 148; 27 L. R. A. 271; 38 N. E. 432. ¹⁷ *Treasurer v. Mining Co.*, 23 Cal. 390.

¹³ *Barton v. De Wolf*, 108 Ill. 195. 189; *Leach v. Fobes*, 11 Gray (Mass.) 506; 71 Am. Dec. 732.

¹⁴ *Moulton v. Mfg. Co.*, 81 Minn. 259; 83 N. W. 1082. ¹⁹ *Doloret v. Rothschild*, 1 Sim. & St. 590; 2 L. J. Ch. 125.

¹⁵ *Rigg v. Ry.*, 191 Pa. St. 298; 43 Atl. 212. ²⁰ *Kohn v. Williamson*, 66 Fed. 655; 13 C. C. A. 668; *Cowles v.*

¹⁶ *Eckstein v. Downing*, 64 N. H.

the money with which the transferrer bought the stock,²¹ or where the transferee originally transferred the stock to the transferrer gratuitously under his agreement to reconvey on demand,²² or where the stock was originally acquired by the transferrer under a contract to transfer it to the transferee on the payment by him of the amount agreed upon,²³ specific performance will be granted, even apart from considerations of the difficulty of estimating damages or of obtaining the stock. The transaction gives to the transferee an equitable interest which equity will protect. The contract for the transfer of stock may involve the transfer of other property by reason whereof equity may grant specific performance without reference to the question whether the nature of the stock itself is such as to make specific performance proper, as where the stock is to be exchanged for specific realty and specific performance is given because of the land involved.²⁴ A contract to convey all the corporate stock of a distillery has been enforced specifically on the theory that it was really a contract for the purchase of all the real and personal property of the distillery.²⁵

§1631. Contracts for personalty connected with realty.

Contracts to sell personalty may be so closely connected with a contract concerning some interest in realty that the entire contract may be enforceable specifically, although by themselves the provisions concerning personalty would not entitle the party seeking relief to specific performance. Thus a contract to convey real and personal property together may be enforced specifically, as a contract to sell a furnished house.¹

Whitman, 10 Conn. 121; 25 Am. 121; 25 Am. Dec. 60; Hager v. Dec. 60; Kimball v. Morton, 5 N. J. Reed, 11 O. S. 626.
Eq. 26; Hager v. Reed, 11 O. S. 24 Burton v. Shotwell, 13 Bush
626; Goodwin, etc., Co.'s Appeal, (Ky.) 271; Leach v. Fobes, 11
117 Pa. St. 514; 2 Am. St. Rep. Gray (Mass.) 506; 71 Am. Dec.
696; 12 Atl. 736. 732.

²¹ Johnson v. Brooks, 93 N. Y. 337.

²² Draper v. Stone, 71 Me. 175.

²³ Cowles v. Whitman, 10 Conn.

²⁵ Perin v. Megibben, 53 Fed. 86; 3 C. C. A. 443.

¹ Fowler v. Sands, 73 Vt. 236; 50 Atl. 1067.

So a contract to cut trees on a specific tract of realty and to saw them into lumber,² or to cut trees on a specified tract of realty, manufacture them into wood-pulp, and sell the wood-pulp to the party seeking relief,³ are enforced specifically, since they are looked upon as passing an interest in realty.

IV. RESTRICTIONS ON EQUITABLE RELIEF.

§1632. Specific performance denied if decree unenforceable.

Specific performance will not be decreed where such performance is in fact impossible and such decree cannot be enforced. Thus if the property contracted for was never owned by the vendor¹ or is not in existence² no decree for specific performance will be rendered. So if the vendor has sold the property to a *bona fide* purchaser against whom such decree cannot be enforced equity will not decree specific performance in a suit against the original vendor.³ This principle has been applied to contracts to issue stock to a subscriber, when the corporation has issued to *bona fide* purchasers all the stock at its disposal,⁴ or to contracts to sell stock when the vendor has sold to *bona fide* purchasers the stock contracted for.⁵ If the vendor has shares of the corporation enough to fill the contract specific performance will be decreed, even if he has sold the identical shares owned by him when he made the contract of sale.⁶ Conversely, if the vendee receives the proper number of shares

² *Borner v. Canaday*, 79 Miss. 667; *Smith v. Bank*, 137 Cal. 363; 222; 55 L. R. A. 328; 30 So. 638. 70 Pac. 184.

(This relief was here refused, however, for another reason: namely, that its performance by the receiver who had been appointed to take charge of the property would be an undue tax upon the superintendence of the court.)

³ *St. Regis Paper Co. v. Lumber Co.*, 173 N. Y. 149; 65 N. E. 967.

¹ *Hildreth v. Thibodeau*, 117 Fed. 146; *Du Bois v. Bormann*, — N. J. Eq. —; 55 Atl. 634.

² *Kennedy v. Hazelton*, 128 U. S.

³ *Summerlin v. Milling Co.*, 41 Fed. 249; *Birmingham National Bank v. Roden*, 97 Ala. 404; 11 So. 883.

⁴ *Summerlin v. Milling Co.*, 41 Fed. 249; *Chaffee v. Ry.*, 146 Mass. 224; 16 N. E. 34.

⁵ *Birmingham National Bank v. Roden*, 97 Ala. 404; 11 So. 883; *Wonson v. Fenno*, 129 Mass. 405; *Sewall v. Ry.*, 9 Cush. (Mass.) 5.

⁶ *Draper v. Stone*, 71 Me. 175.

in the same corporation he cannot complain because he does not receive the specific shares contracted for.⁷ If the promisor agrees to convey realty which he does not own at the time that the contract is entered into, but which he afterwards acquires, specific performance may be decreed.⁸

§1633. Contract for continuous duties.

A common illustration of the denial of specific performance in cases where, though the remaining facts are sufficient to justify such equitable relief, the decree cannot be enforced is found in the cases of contracts involving continuous duties of a personal nature or involving personal taste, discretion and skill.¹ Thus a contract to support one, as a member of one's household,² to open and develop a mine,³ to quarry and deliver for a considerable period of time marble blocks of specified size, shape and quality,⁴ to secure a right of way for another,⁵ to furnish news for a term of years,⁶ to operate a railway line,⁷ to construct a railway line,⁸ or to remove a specified building,⁹ are all of them contracts of which specific performance will not be given, since decrees to perform them cannot be enforced by the courts.

⁷ Hardenbergh v. Bacon, 33 Cal. 356.

⁸ Coleridge Creamery Co. v. Jenkins. — Neb. —; 92 N. W. 123.

¹ Marble Co. v. Ripley, 10 Wall. (U. S.) 339; Atlanta, etc., R. R. v. Speer, 32 Ga. 550; Richmond v. R. R., 33 Ia. 422; Caswell v. Gibbs, 33 Mich. 331; Port Clinton R. R. v. R. R., 13 O. S. 544.

² Chadwick v. Chadwick, 121 Ala. 580; 25 So. 631; Bourget v. Monroe, 58 Mich. 563; 25 N. W. 514; Bumpus v. Bumpus, 53 Mich. 346; 19 N. W. 29; Mowers v. Fogg, 45 N. J. Eq. 120; 17 Atl. 296. "The court of equity will not undertake to regulate or control the performance of such continuous duties and it would be powerless to do so by

any of its process." Chadwick v. Chadwick, 121 Ala. 580, 582; 25 So. 631.

³ Stanton v. Singleton, 126 Cal. 657; 47 L. R. A. 334; 59 Pac. 146.

⁴ Marble Co. v. Ripley, 10 Wall. (U. S.) 339.

⁵ Dukes v. Bash, 29 Ind. App. 103; 64 N. E. 47.

⁶ Iron Age Publishing Co. v. Telegraph Co., 83 Ala. 498; 3 Am. St. Rep. 758; 3 So. 449.

⁷ Port Clinton R. R. v. R. R., 13 O. S. 544.

⁸ Kansas, etc., Co. v. Ry., 135 Mass. 34; 46 Am. Rep. 439. (Especially if in another state.)

⁹ Armour v. Connolly (N. J. Eq.), 49 Atl. 1117.

§1634. Contracts to convey realty in consideration of support.

Whether specific performance of a contract to convey property in consideration of a contract by the grantee to support the grantor can be given at the instance of the grantee is a question upon which there is a conflict of authority. In some cases it has been held that the grantee may have specific performance if such relief should have been given under the contract to convey if supported by a money consideration.¹ It is generally assumed the specific performance cannot be given to the grantor, since it is impracticable for a court of equity to oversee and compel its actual performance.² In other cases, therefore, it has been held that the doctrine of mutuality requires equity to deny the remedy of specific performance to the grantee, as the vendor could not have it.³

§1635. Contracts of partnership.

A contract to form a partnership is one the breach of which cannot ordinarily be compensated for by money damages, and the damages arising from which are ordinarily difficult to estimate. From these principles it follows that specific performance of such contracts may be had unless other facts of the case make it impracticable or impossible. Whether a contract to form a partnership is enforceable specifically in equity or not depends primarily on its duration. If for a single transaction¹ or for limited duration² it will ordinarily be enforced specifically. If, on the other hand, its duration is not fixed, it is terminable at will, and since specific performance would be useless it will in general be denied.³ Even this rule is not ar-

¹ Clancy v. Flusky, 187 Ill. 605; 52 L. R. A. 277; 58 N. E. 594 (following Irwin v. Dyke 114 Ill. 302; 1 N. E. 913; Stillings v. Stillings, 67 N. H. 584; 42 Atl. 271).

² Chadwick v. Chadwick, 121 Ala. 580; 25 So. 631; Mowers v. Fogg, 45 N. J. Eq. 120; 17 Atl. 296.

³ Gardner v. Knight, 124 Ala. 273; 27 So. 298. For the doctrine

of mutuality of remedy, see § 1621 *et seq.*

¹ Scott v. Rayment, L. R. 7 Eq. 112.

² Morris v. Peckham, 51 Conn. 128.

³ Hercy v. Birch, 9 Ves. Jr. 357; Clark v. Truitt, 183 Ill. 239; 55 N. E. 683.

bitrary. The party who seeks relief may have altered his position in reliance upon the contract, so that he will be prejudiced greatly if the partnership is not formed, and he will receive substantial relief if the partnership is formed, even if it is immediately ended. In such cases equity will decree specific performance.⁴ Shares of stock in a joint-stock company which is by statute not a corporation have been treated as analogous to interests in a partnership, and specific performance has been denied,⁵ though in other cases such shares have been treated as analogous to corporate stock and specific performance has been given.⁶

§1636. Compensation in equity.

If the relief sought is essentially money damages for invasion of a legal contractual right, equity has of course no jurisdiction, since the case is one for which there is a plain, adequate and complete remedy at law.¹ Special facts may, however, authorize equity to award money damages either in lieu of specific performance or in addition thereto.² Thus if the case is one in which specific performance would have been awarded but for the fact that by reason of circumstances unknown to the plaintiff enforcement of the decree has become impossible, equity may award compensation in damages to the plaintiff.³ Thus if an owner⁴ of corporate stock has agreed to

⁴ *Wilson v. Campbell*, 10 Ill. 383; *St. Joseph Hydraulic Co. v. Paper Co.*, 156 Ind. 665; 59 N. E. 995; *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459; *Birchett v. Bolling*, 5 Munf. (Va.) 442.

⁵ *Sheffield Gas Consumers' Co. v. Harrison*, 17 Beav. 294.

⁶ *Oriental Inland Steam Co. v. Briggs*, 4 De G. F. & J. 191; *New Brunswick, etc., Co. v. Muggeridge*, 4 Drew. 686.

¹ *Pierce v. Plumb*, 74 Ill. 326; *Bradford, etc., Ry. v. Ry.*, 123 N. Y.

316; 11 L. R. A. 116; 25 N. E. 499.

² (*Columbus, etc.*) *Railroad v. Steinfeld*, 42 O. S. 449.

³ *Pratt v. Law*, 9 Cranch (U. S.) 456; *Birmingham National Bank v. Roden*, 97 Ala. 404; 11 So. 883; *Thresher v. Bank*, 68 Conn. 201; 36 Atl. 38; *Cornell v. Rodabaugh*, 117 Ia. 287; 90 N. W. 599; *Chaffee v. R. R.*, 146 Mass. 224; 16 N. E. 34.

⁴ *Chaffee v. R. R.*, 146 Mass. 224; 16 N. E. 34; *Wonson v. Fenno*, 129 Mass. 405.

sell it or a corporation⁵ has contracted to issue stock; and when specific performance is sought, the vendor has disposed of all his stock, equity may decree compensation in lieu of specific performance. Thus an action was brought to enforce specific performance of a contract to maintain and operate a railroad on a given route. Before final decree was rendered the original line of the railroad had so decayed that it could not be used, the business of the road being transferred to a new line. It was held that while specific performance had become impracticable compensation should be decreed.⁶ If, however, the plaintiff knows facts which make specific performance impracticable and with such knowledge brings a suit for specific performance, some courts hold that neither specific performance nor compensation can be given.⁷ If a contract to convey realty cannot be enforced specifically, the vendee may have compensation for the value of improvements made by him upon the realty contracted for, and may have a lien therefor declared upon such realty.⁸ So if the vendor repudiates the contract, the vendee may have compensation and a lien for the part of the purchase money paid in and the value of the improvements made.⁹ Compensation has been given even to a party guilty of laches which prevents him from obtaining specific performance, where limitations has elapsed pending the suit in equity.¹⁰

§1637. Conditional specific performance.

Since specific performance is discretionary and may be refused in case great hardship will result to the party against whom the relief is sought, the court may give such relief upon

⁵ *Birmingham National Bank v. Roden*, 97 Ala. 404; 11 So. 883.

⁶ *Chapman v. R. R.*, 6 O. S. 119.

⁷ *Mack v. McIntosh*, 181 Ill. 633; 54 N. E. 1019; *Sternberger v. McGovern*, 56 N. Y. 12; *Hatch v. Cobb*, 4 Johns. Ch. (N. Y.) 559; *Cunningham v. Duncan*, 4 Wash. 506; 30 Pac. 647.

⁸ *Pratt v. Law*, 9 Cranch (U. S.) 456; *Powell v. Higley*, 90 Ala. 103;

7 So. 440; *Allen v. Young*, 88 Ala. 338; 6 So. 747; *Aday v. Echols*, 18 Ala. 353; 52 Am. Dec. 225; *Mason's, etc., Appeal*, 70 Pa. St. 26; *Hilton v. Duncan*, 1 Coldw. (Tenn.) 313.

⁹ *Tyler v. Cate*, 29 Or. 515; 45 Pac. 800.

¹⁰ *Combs v. Scott*, 76 Wis. 662; 45 N. W. 532.

such terms and conditions as will prevent such hardship from resulting.¹ Thus an option to sell at a certain price, given when the only money recognized by law as legal tender was gold and silver coin, will be enforced specifically after paper currency has been made a legal tender and has depreciated to one half the value of coin, but only on condition that the purchase money is paid in the stipulated amount of coin.² So if there is delay in enforcing specific performance of a contract to assign a patent-right, specific performance may be given on condition that the right of accounting be waived.³ So A agreed to sell realty to B. B agreed to resell to C, and A agreed to accept C. Subsequently A, understanding that the deed was to be made to C, executed and delivered such a deed, and C mortgaged to X, a *bona fide* mortgagee, to raise money to pay to A the unpaid purchase money. B sued for specific performance against A and to have the deed to C set aside. It was held that he could have such relief, but on condition that the mortgage to X was treated as valid.⁴

§1638. Laches as affecting specific performance.

The effect of laches in preventing equitable relief is discussed elsewhere. The duty of one seeking equitable relief to refrain from unreasonable delay is especially clear where specific performance is the relief sought.¹ If application to the court for relief is delayed until circumstances so change as to

¹ Giddings v. Water Co., 109 Cal. 116; 41 Pac. 788; Brewer v. Peed, 7 J. J. Mar. (Ky.) 230.

² Willard v. Tayloe, 8 Wall. (U. S.) 557.

³ Harrigan v. Smith, 57 N. J. Eq. 635; 42 Atl. 579.

⁴ Fountain v. Leveque, 108 Mich. 614; 66 N. W. 575.

¹ Levy v. Stogdon (1899), 1 Ch. 5; same case (1898), 1 Ch. 478; Davison v. Davis, 125 U. S. 90; Watts v. Waddle, 6 Pet. (U. S.) 289; Seculovich v. Morton, 101

Cal. 673; 40 Am. St. Rep. 106; 36 Pac. 387; Hurd v. Hotchkiss, 72 Conn. 472; 45 Atl. 11; Tate v. Development Co., 37 Fla. 439; 53 Am. St. Rep. 251; 20 So. 542; Bennett v. Welch, 25 Ind. 140; 87 Am. Dec. 354; Fuller v. Hovey, 2 All. (Mass.) 324; 79 Am. Dec. 782; Campbell v. Hicks, 19 O. S. 433; Bracken v. Martin, 3 Yerg. (Tenn.) 55; Lowther Oil Co. v. Oil Co., 53 W. Va. 501; 97 Am. St. Rep. 1027; 44 S. E. 433.

produce special hardship to the adversary party if such relief is granted, specific performance may be denied in cases where it would have been granted had the relief been invoked promptly.² The duty of acting promptly is especially clear in contracts for the sale of property of fluctuating value, such as corporate stock.³ A delay of five and a half years,⁴ three years,⁵ and six months⁶ have each been held under the peculiar circumstances of each case to be for periods so long as to prevent this relief. If realty contracted for undergoes considerable change in value, a delay in seeking relief may prevent the injured party from obtaining specific performance.⁷ Thus a delay of six years,⁸ of five years,⁹ two years,¹⁰ have each been held to be such delay as prevents the injured party from obtaining specific performance. In other jurisdictions greater latitude of delay is allowed. Thus a delay of fourteen years¹¹ has been held not to be so great as to prevent specific performance. Greater latitude of delay is allowed where the party seeking relief is a vendee in possession of the realty contracted for.¹²

² *Holgate v. Eaton*, 116 U. S. 33; *Holt v. Rogers*, 8 Pet. (U. S.) 420; *Mathews v. Davis*, 102 Cal. 202; 36 Pac. 358; *Smith v. Cansler*, 83 Ky. 367; *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; *Anderson v. Mining Co.*, 70 Minn. 23; 72 N. W. 820; *Smith v. Christmas*, 7 Yerg. (Tenn.) 565; *Newberry v. French*, 98 Va. 479; 36 S. E. 519; *Lowther Oil Co. v. Oil Co.*, 53 W. Va. 501; 97 Am. St. Rep. 1027; 44 S. E. 433.

³ *Davison v. Davis*, 125 U. S. 90; *Wonson v. Fenno*, 129 Mass. 405; *Rogers v. Van Nortwick*, 87 Wis. 414; 58 N. W. 757.

⁴ *Davison v. Davis*, 125 U. S. 90 (the stock having almost doubled in value).

⁵ *Schimpff v. Bank*, 208 Pa. St. 380; 57 Atl. 767 (the stock having in the meanwhile become four times as valuable); *Rogers v. Van Nort-*

wick, 87 Wis. 414; 58 N. W. 757.

⁶ *Wonson v. Fenno*, 129 Mass. 410.

⁷ *Johns v. Norris*, 22 N. J. Eq. 102; *Ruff's Appeal*, 117 Pa. St. 310; 11 Atl. 553; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Combs v. Scott*, 76 Wis. 662; 45 N. W. 532.

⁸ *Combs v. Scott*, 76 Wis. 662; 45 N. W. 532. (The land having increased in value greatly.)

⁹ *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305.

¹⁰ *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Merritt v. Brown*, 21 N. J. Eq. 401.

¹¹ *Parish v. Parish*, 32 Beav. 207.

¹² *Scadden, etc., Co. v. Scadden*, 121 Cal. 33; 53 Pac. 440; *Tate v. Development Co.*, 37 Fla. 439; 53 Am. St. Rep. 251; 20 So. 542; *Sheldon v. Dunbar*, 200 Ill. 490; 65 N. E. 1095; *Low v. Low*, 173 Mass.

Thus specific performance has been given in such cases after eleven years.¹³

§1639. By whom and against whom specific performance may be had.

In a proper case for specific performance the remedy will be given against the promisor, or, to the extent of their interests in the property contracted for, against any claiming under him, such as heirs,¹ or the widow of the promisor,² or purchasers with notice,³ as transferees in fraud of the rights of the party who seeks specific performance.⁴ The remedy cannot be given against *bona fide* purchasers of the property without notice of the contract,⁵ whether they acquire their interests by a contract prior to⁶ or subsequent to⁷ the contract sought to be enforced specifically. Specific performance may be given in a proper case at the application of the adversary party to the contract or of those claiming under him, such as his heirs⁸ or his assignee for the benefit of his creditors.⁹ An execution creditor of a party to a contract who seeks to reach his debtor's interest and enforce the contract specifically cannot enforce the contract unless his debtor could, and hence cannot enforce it where the debtor has failed to perform conditions precedent.¹⁰

580; 54 N. E. 257; Minneapolis, etc., Ry. v. Chisholm, 55 Minn. 374; 57 N. W. 63.

¹³ Sheldon v. Dunbar, 200 Ill. 490; 65 N. E. 1095.

¹ Mueller v. Nortmann, 116 Wis. 468; 93 N. W. 538.

² Burdine v. Burdine, 98 Va. 515; 81 Am. St. Rep. 741; 36 S. E. 992.

³ Northern Central Ry. v. Walworth, 193 Pa. St. 207; 74 Am. St. Rep. 683; 44 Atl. 253. (Corporate stock.)

⁴ Ames v. Witbeck, 179 Ill. 458;

53 N. E. 969. (Corporate stock.)

⁵ Charlton v. Real Estate Co., 64 N. J. Eq. 631; 54 Atl. 444.

⁶ Flackhamer v. Himes, 24 R. I. 306; 53 Atl. 46.

⁷ Shields v. Trammell, 19 Ark 51; Ferrier v. Buzick, 2 Ia. 136.

⁸ Hadden v. Thompson, 118 Ga. 207; 44 S. E. 1001.

⁹ Blanton v. Warehouse Co., 120 Fed. 318.

¹⁰ Costello v. Friedman, — Ariz. —; 71 Pac. 935.

CHAPTER LXXVI.

INJUNCTION.

§1640. Injunction as negative specific performance.

We pass from a consideration of the equitable remedy of specific performance of affirmative covenants to the remedy of injunction, given to restrain a breach of negative covenants. To enjoin a party to a contract from breaking some provision thereof is a "negative specific performance."¹ Such a suit is said to be "a case, so far as the covenant is concerned, for a negative specific performance by means of an injunction."² A bill in equity seeking such relief is, "though not strictly a bill for the specific performance of a contract, is in substance a bill of that kind."³ The relief given by this remedy is specific and not compensatory.⁴ Such remedy is, of course, especially suitable to negative covenants, where the injunction can restrain a party to the contract from doing an act which is forbidden by such contract.⁵ The general theory on which such remedy is given is the same as that underlying specific performance.⁶ The absence of a plain, adequate and complete

¹ *Dills v. Doeblen*, 62 Conn. 366 (368); 36 Am. St. Rep. 345; 20 L. R. A. 432; 26 Atl. 389.

² *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 110; 60 L. R. A. 822; 66 N. E. 436.

³ *Chicago, etc., Co. v. Lake*, 130 Ill. 42, 60; quoted in *Welty v. Jacobs*, 171 Ill. 624, 631; 40 L. R. A. 98; 49 N. E. 723. To the same effect see *South Chicago City Ry. v. Ry.*, 171 Ill. 391; 49 N. E. 576.

⁴ *Williams v. Montgomery*, 148 N. Y. 519; 43 N. E. 57. "A court

of equity, where there is a basis for the assertion of its jurisdiction, will not suffer men to depart from their agreements at pleasure, leaving the party with whom they have contracted to the mere chance of damages which a jury may give." *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 110; 60 L. R. A. 822; 66 N. E. 436.

⁵ *Hapgood v. Rosenstock*, 23 Fed. 86.

⁶ "The jurisdiction of equity to grant such an injunction is sub-

remedy at law is therefore essential. Accordingly injunction cannot be given to restrain the breach of a contract by a board of education to adopt a certain arithmetic in the schools of a city for the period of five years,⁷ or a contract for the sale of bark, which the vendor is threatening to sell to other persons.⁸ Since liquidated damages can be recovered,⁹ it follows that if the parties to a contract have made a valid stipulation for the liquidated damages to be paid in case of breach, they have by their own agreement provided a remedy at law which they evidently consider complete and adequate. Accordingly injunction will be denied where liquidated damages are provided for, even in cases where, without such provision, injunction would be given on the ground that the remedy at law is not adequate.¹⁰ On the other hand, since a penalty cannot be recovered,¹¹ it follows that a stipulation for a penalty does not prevent an injunction from being awarded if without such provision the injunction would have been granted.¹² Accordingly in cases of this sort, as in specific performance, relief will not be given in equity if the remedy at law in the form of money damages is plain, adequate and complete.¹³ There would, accordingly, be little to add to what has already been said of specific performance if it were not that in some jurisdictions the negative remedy of injunction is broader than that of specific performance, and that the former relief is given in same cases in which the latter is denied. In comparing this doctrine with that of specific performance the cases may be grouped into three general classes: (1) Cases in which all the covenants have been per-

stantially coincident with its jurisdiction to compel specific performance by an affirmative decree." *Dills v. Doebler*, 62 Conn. 366 (368); 36 Am. St. Rep. 345; 20 L. R. A. 432; 26 Atl. 398.

⁷ *Attorney General v. Detroit*, — Mich. —; 95 N. W. 746.

⁸ *Mundy v. Brooks*, 204 Pa. St. 232; 53 Atl. 1000.

⁹ See § 1171.

¹⁰ *Dills v. Doebler*, 62 Conn. 366;

36 Am. St. Rep. 345; 20 L. R. A. 432; 26 Atl. 398; *Martin v. Murphy*, 129 Ind. 464; 28 N. E. 1118; *Coe v. Ry.*, 10 O. S. 372; 75 Am. Dec. 518.

¹¹ See § 1170.

¹² *Ropes v. Upton*, 125 Mass. 258.

¹³ *Dills v. Doebler*, 62 Conn. 366; 36 Am. St. Rep. 345; 20 L. R. A. 432; 26 Atl. 398; *Gas Light, etc. Co. v. New Albany*, 139 Ind. 660; 39 N. E. 462.

formed except the negative covenants for which injunction is sought; (2) cases in which the executory affirmative covenants are such that specific performance could be given and injunction is sought to enforce the negative covenants; and (3) cases in which the executory covenants are such that specific performance could not be given and injunction is sought to enforce the negative covenants.

§1641. Negative covenants only remaining executory.— Realty.

If all the covenants of a contract have been performed except the negative covenants, injunction may be given if the proper circumstances for the exercise of equitable relief are present.¹ Thus a negative covenant as to the use of realty,² as that buildings erected thereon shall be set back a certain distance from the street,³ or that buildings of a certain kind and cost only shall be erected upon the realty,⁴ or that certain realty shall not be used for the sale of intoxicating liquor,⁵ or for hotel purposes,⁶ or for a church,⁷ or for breaking stone,⁸ or covenants as to the use of leased premises,⁹ such as provide for the kind of building to be erected by the lessee on the leased premises,¹⁰ or providing that the lessee of realty situated in the grounds of a

¹ *Winnepesaukee Association v. Grodon*, 63 N. H. 505; 3 Atl. 426.

² *Lattimore v. Livermore*, 72 N. Y. 174.

³ *Hills v. Metzenroth*, 173 Mass. 423; 53 N. E. 890; *Jackson v. Stevenson*, 156 Mass. 496; 32 Am. St. Rep. 476; 31 N. E. 691; *Frink v. Hughes*, — Mich. —; 94 N. W. 601; *Buck v. Adams*, 45 N. J. Eq. 552; 17 Atl. 961; *Gawtry v. Leland*, 40 N. J. Eq. 323; *Gawtry v. Leland*, 31 N. J. Eq. 385; *McGuire v. Caskey*, 62 O. S. 419; 57 N. E. 53.

⁴ *Frink v. Hughes*, — Mich. —; 94 N. W. 601.

⁵ *Hall v. Solomon*, 61 Conn. 476; 29 Am. St. Rep. 218; 23 Atl. 876; *Star Brewing Co. v. Primas*, 163 Ill. 652; 45 N. E. 145; *Sutton v. Head*,

86 Ky. 156; 9 Am. St. Rep. 274; 5 S. W. 410; *Watrous v. Allen*, 57 Mich. 362; 58 Am. St. Rep. 363; 24 N. W. 104.

⁶ *Stines v. Dorman*, 25 O. S. 580.

⁷ *St. Andrew's Church's Appeal*, 67 Pa. St. 512.

⁸ *Haskell v. Wright*, 23 N. J. Eq. 389.

⁹ *Wertheimer v. Circuit Judge*, 83 Mich. 56; 47 N. W. 47; *Stees v. Kranz*, 32 Minn. 313; 20 N. W. 241.

¹⁰ *Kraft v. Welch*, 112 Ia. 695; 84 N. W. 908. (Where lessee was authorized to erect a store building to be used in connection with the other buildings which were leased for creamery purposes.)

camp-meeting should pay an admission fee to such grounds,¹¹ can be enforced by injunction. Contracts as to the use of realty need not be in the deed to be thus enforced; as contracts collateral to a conveyance or entirely disconnected from any conveyance, such as agreements between adjoining land owners as to the use to be made of their respective lands.¹² Covenants which create easements may be protected by injunction, such as a contract to divert only so much water as can be pumped through a pipe not exceeding two inches in diameter.¹³

§1642. Covenants not concerning realty.

Covenants concerning the use of realty may be looked upon as giving the adversary party some interest in such realty which may be protected by injunction. The doctrine of relief by injunction is, however, by no means limited to contracts of this class. A contract not to compete in a certain business or trade will, if not void as unreasonable, be enforced by injunction.¹ So injunction has been given to prevent breach of a covenant by a physician,² or a dentist,³ or a dressmaker,⁴ not

¹¹ *Linwood Park Co. v. Van Dusen*, 63 O. S. 183; 58 N. E. 576.

¹² *Parker v. Nightingale*, 6 All. (Mass.) 341; 83 Am. Dec. 632; *Trustees v. Lynch*, 70 N. Y. 440; 26 Am. Rep. 615.

¹³ *Salem Flouring Mills Co. v. Lord*, 42 Or. 82, 103; 69 Pac. 1033; 70 Pac. 832. (Where the grantee had constructed an underground conduit, which plaintiff could not inspect, and was pumping water through two ten-inch pipes.)

¹ *Booth v. Davis*, 127 Fed. 875; *Ragsdale v. Nagle*, 106 Cal. 332; 39 Pac. 628; *Brown v. Kling*, 101 Cal. 295; 35 Pac. 995; *O'Neal v. Hines*, 145 Ind. 32; 43 N. E. 946; *Angier v. Webber*, 14 All. (Mass.) 211; 92 Am. Dec. 748; *Grow v. Seligman*, 47 Mich. 607; 41 Am. Rep. 737; 11 N. W. 404; *Fleckenstein Bros. Co. v. Fleckenstein*, —

N. J. Eq. —; 53 Atl. 1043; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; 13 N. E. 419; *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733; 32 L. R. A. 829; 24 S. E. 212; *Pittsburg, etc., Co. v. Stove Co.*, 208 Pa. St. 37; 57 Atl. 77; *Wilkinson v. Colley*, 164 Pa. St. 35; 26 L. R. A. 114; 30 Atl. 286; *Jackson v. Byrnes*, 103 Tenn. 698; 54 S. W. 984.

² *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806; *Timmerman v. Dever*, 52 Mich. 34; 50 Am. Rep. 240; 17 N. W. 230; *French v. Parker*, 16 R. I. 219; 27 Am. St. Rep. 733; 14 Atl. 870.

³ *Cook v. Johnson*, 47 Conn. 175; 35 Am. Rep. 64.

⁴ *Morgan v. Perhamus*, 36 O. S. 517; 38 Am. Rep. 607.

to engage in the practice of his profession, business or trade. The contracts already discussed are entered into to protect the good will of a business or a practice which has been sold by the party who agrees to refrain from competition. Injunction may be given in other cases. Thus a contract by a department store not to sell any patterns of any make other than that of the adversary party to the contract,⁵ or a contract between a number of business men to close their places of business at a certain hour,⁶ or a covenant by a lessee not to sell any beer except that of a specified manufacture on the leased premises,⁷ may be enforced by injunction. A contract to take electric energy from one company alone for five years may be enforced by injunction to prevent the party to whom it was furnished from taking such energy from any other person.⁸ Injunction has, however, been refused under a similar contract for supplying gas on the theory that the remedy at law was adequate.⁹ Injunction has been allowed where the party under contract to furnish gas breaks or threatens to break his contract.¹⁰ Thus a contract between a natural gas company and a city whereby the gas company agrees not to charge more than a certain price for gas may be enforced by injunction if the gas company attempts to charge a higher rate than that agreed upon.¹¹ An employe who learns trade secrets often agrees not to engage in a competing business during his employment or sometimes within a reasonable period thereafter. Such contracts, if reasonable, are valid,¹² and may be enforced by injunction.¹³ A

⁵ *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60; 68 Am. St. Rep. 749; 43 L. R. A. 854; 51 N. E. 408.

⁶ *Stovall v. McCutchen*, 107 Ky. 577; 54 S. W. 969.

⁷ *Ferris v. Brewing Co.*, 155 Ind. 539; 52 L. R. A. 305; 58 N. E. 701. (Even if the lessor is not the brewing company. See § 1315.)

⁸ *Metropolitan Electric Supply Co. v. Ginder* (1901), 2 Ch. 799. (Even if there is no express negative covenant.)

⁹ *Steinau v. Gas Co.*, 48 O. S. 324; 27 N. E. 545. So of a contract for the exclusive supply of electricity. *Dewey Hotel Co. v. Lighting Co.*, 17 App. D. C. 356.

¹⁰ *Gallagher v. Gaslight Co.*, 141 Cal. 699; 75 Pac. 329.

¹¹ *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97; 60 L. R. A. 822; 66 N. E. 436.

¹² See § 374.

¹³ *Westervelt v. Paper Co.*, 154 Ind. 673; 57 N. E. 552; *Thum Co. v. Tloczynski*, 114 Mich. 149; 68

covenant by one who has accepted and entered into an employment in which he has learned many of his employer's trade secrets not to engage in the same business with any other employer during the term of his employment, within a radius of twelve hundred miles of Chicago, may be enforced by injunction.¹⁴ In cases of this sort the ground of relief in equity is the inadequacy of the relief at law. It is perfectly possible for the good will of a business to be ruined, while the unfortunate proprietor thereof may not be able to prove any actual damage as the result of the defendant's wrongful act. Such covenants must be in reasonable restraint of trade. What restraints are reasonable is discussed elsewhere.¹⁵ A breach must either be threatened or exist, to justify this remedy. What constitutes a breach of such contracts is elsewhere discussed.¹⁶

§1643. Affirmative executory covenants enforceable specifically.

If the affirmative executory covenants are such as can be enforced by a decree of specific performance, injunction will generally be granted to restrain breach of the negative covenants.¹ Thus where performance of a contract concerning the use of railway tracks and a right of way can be enforced specifically breach thereof may be prevented by injunction.² So a contract to give to vendee the first refusal of vendor's realty may be enforced by injunction if the vendor threatens to sell the realty to another.³ So an injunction may be given against cutting off the supply of natural gas furnished under contract.⁴ While one who has agreed to buy specific corporate stock may enjoin the vendor from disabling himself from performance by selling so much stock that he will not have enough to deliver

Am. St. Rep. 469; 38 L. R. A. 200; 72 N. W. 140; *Salomon v. Hertz*, 40 N. J. Eq. 400; 2 Atl. 379.

¹⁴ *Harrison v. Refining Co.*, 116 Fed. 304; 58 L. R. A. 915.

¹⁵ See § 375 *et seq.*, involving a discussion of most of the cases here cited.

¹⁶ See § 1451.

¹ *Davis v. Davis*, 89 Fed. 532.

² *Joy v. St. Louis*, 138 U. S. 1.

³ *Manchester Ship Canal Co. v. Race Course Co.* (1900), 2 Ch. 352.

⁴ *Simpson v. Glass Co.*, 28 Ind. App. 343; 62 N. E. 753.

under the contract, yet if the corporation will, after issuing the stock contemplated, have enough stock left to perform its contract with the vendee, the latter cannot have an injunction against the contemplated issue.⁵

§1644. Affirmative executory covenants not enforceable specifically.

If the executory covenants are in part affirmative ones which cannot be enforced by specific performance and in part negative ones, the question whether equity will grant relief against breach of the negative covenants by injunction is one on which there is a conflict of authority. The cases in which this question is presented are usually cases of contracts for personal services. The original rule in this country seems to have been that equity would grant no relief, affirmative or negative, in contracts for personal services,¹ even if there was an express negative covenant.² Modern courts have, however, receded somewhat from this extreme and uncompromising position.³ In some cases it has been held that if the services contracted for are unique in character and if by reason of the special knowledge, skill, ability or reputation of the party rendering them it is difficult for the adversary party to provide a substitute therefor, equity will give an injunction against the breach of a negative covenant by the employe not to render services to any other person during his term of employment.⁴ Thus

⁵ *Quin v. Havenor*, 118 Wis. 53; 94 N. W. 642.

¹ *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *De Rivafrinoli v. Corsetti*, 4 Paige (N. Y.) 264; 25 Am. Dec. 532. *Actors. Kemble v. Kean*, 6 Sim. 333; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529.

² *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315.

³ Thus *Kemble v. Kean*, 6 Sim. 333, was expressly overruled in *Lumley v. Wagner*, 1 De G. M. & G. 604.

⁴ "Where a contract stipulates for special unique or extraordinary personal services or acts, or where the services to be rendered are purely intellectual or are peculiar and individual in their character, the court will grant an injunction in aid of specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages." *The William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 364; 18 Am. St. Rep. 278; 7 L. R. A. 779; 20 Atl. 467.

an injunction has been given against breach of a contract by an actor,⁵ or a base-ball player,⁶ each of peculiar ability and great reputation. If there is no express negative covenant that the employe will not accept employment elsewhere during his term, some courts have refused to enjoin him from accepting other employment.⁷ In other jurisdictions it is held that injunction may be given even if there is no express negative covenant to refrain from accepting employment elsewhere, since such a negative covenant is necessarily inferred from the affirmative covenant to perform services for the party seeking relief.⁸ If the services contracted for are not of a unique or extraordinary character, equity will not enjoin the employe from accepting other employment during his term.⁹ Under this principle it has been held that a traveling salesman and secretary,¹⁰ a special insurance agent,¹¹ a collector,¹² railroad employes,¹³ or acrobats and tumblers,¹⁴ will not be enjoined from accepting other employment during their term of employment, if it is not shown that their services are of extraordinary and unique value. It has, however, been held that a court goes too far in holding that injunction should be given only when it is impossible to replace the employe.¹⁵

⁵ *Lumley v. Wagner*, 1 De G. M. & G. 604; *Montague v. Flockton*, L. R. 16 Eq. 189.

⁶ "He may not be the sun in the base ball firmament, but he is certainly a bright particular star." *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 217; 90 Am. St. Rep. 627; 58 L. R. A. 227; 51 Atl. 973.

⁷ *Actor. Burton v. Marshall*, 4 Gill (Md.) 478; 45 Am. Dec. 171.

⁸ *Actor. Montague v. Flockton*, L. R. 16 Eq. 189. See obiter to same effect in *Cort v. Lassard*, 18 Or. 221; 17 Am. St. Rep. 726; 6 L. R. A. 653; 22 Pac. 1054.

⁹ *Chain Belt Co. v. Von Sprekel-sen*, 117 Wis. 106; 94 N. W. 78.

¹⁰ *The William Rogers Mfg. Co.*

v. Rogers, 58 Conn. 356; 18 Am. St. Rep. 278; 7 L. R. A. 779; 20 Atl. 467.

¹¹ *Burney v. Ryle*, 91 Ga. 701; 17 S. E. 986.

¹² *Sternberg v. O'Brien*, 48 N. J. Eq. 370; 22 Atl. 348.

¹³ *Arthur v. Oakes*, 63 Fed. 310; 25 L. R. A. 414; *Toledo, etc., Ry. v. Pennsylvania Co.*, 54 Fed. 730; 19 L. R. A. 387. *Contra*, *Farmers', etc., Co. v. Ry.*, 60 Fed. 803; 25 L. R. A. 414 (in foot-note).

¹⁴ *Cort v. Lassard*, 18 Or. 221; 17 Am. St. Rep. 726; 6 L. R. A. 653; 22 Pac. 1054.

¹⁵ *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210; 90 Am. St. Rep. 627; 58 L. R. A. 227; 51 Atl. 973.

§1645. Mutuality.

As in specific performance, injunction will be given only if the contract is mutually binding in obligation upon both parties.¹ Thus if one party has the option under the contract to terminate it, he cannot have injunction against the adversary party who has no such option.² Even on this point, however, the authorities are not unanimous. Thus the right to end a contract for operating a telegraph wire at the end of any year³ or the right to terminate a contract of employment of a baseball player on ten days' notice⁴ have each been held not to prevent injunction against breach by the party to whom the option to terminate is not reserved. In some courts mutuality of remedy as well as of obligation has been insisted on as a requisite to relief by injunction. Thus a contract was made by the owner of a theatre to lease it to the owner and manager of a theatrical troupe. Subsequently the owner of the theatre repudiated the contract and leased to a rival troupe. On suit for injunction it was held that since specific performance could not have been had against the troupe, injunction could not be given against the owner of the theatre.⁵ This is, of course, contrary to the theory underlying injunction for breach of employment contracts, since injunction cannot be given against the employer.⁶

¹ *Lancaster v. Roberts*, 144 Ill. 213; 33 N. E. 27.

² *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Rust v. Conrad*, 47 Mich. 449; 41 Am. Rep. 720; 11 N. W. 265.

³ *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459.

⁴ *Philadelphia Ball Club v. LaJoie*, 202 Pa. St. 210; 90 Am. St. Rep. 627; 58 L. R. A. 227; 51 Atl. 973.

⁵ *Welty v. Jacobs*, 171 Ill. 624; 40 L. R. A. 98; 49 N. E. 723.

⁶ *Stewart v. Pierce*, 116 Ia. 733; 89 N. W. 234.

CHAPTER LXXVII.

THE STATUTE OF LIMITATIONS.

I. ORIGIN AND NATURE OF STATUTE.

§1646. History of doctrine of limitations.

At Common Law lapse of time might give rise to title by prescription or adverse possession in the case of realty. It might give rise to a presumption of payment in the case of debts. Apart from these cases, however, lapse of time did not operate as a bar to an action.¹ Lapse of time as a bar to an action is therefore purely statutory. The statute of James I.² was the original statute of limitations in England of any general application. This statute has, within many modifications and improvements, served as the basis of the statutes of limitation in the United States, though our statutes now, by reason of repeated amendment, have much less in common with the statute of James I. than did our earlier statutes of limitation.

§1647. Statute is one of repose.

One of the first questions to determine in ascertaining the effect of the statute of limitations was whether the statute was one of repose — i. e., whether the mere fact of the lapse of the

¹ *Llanelly, etc., Co. v. Ry.*, L. R. 7 H. L. 567; *United States v. Thompson*, 98 U. S. 486; *Life Ins. Co. v. Buchanan*, 100 Ind. 64; *Green v. Disbrow*, 79 N. Y. 1; 35 Am. Rep. 496; *Cowhick v. Shingle*, 5 Wyom. 87; 63 Am. St. Rep. 17; 25 L. R. A. 608; 37 Pac. 689. "Until one (i. e., a statute of limitations) exists, there can be no bar arising

from the lapse of time. A party entitled can sue whenever he chooses to do so, and he is clothed with all the rights of any other litigant, asserting a claim where there is no statute of limitation applicable to the case." *Hauenstein v. Lynham*, 100 U. S. 483, 488.

² 21 Jac. 1, c. 16.

required time was a complete defense — or whether it was one of presumption only — i. e., whether it merely fixed a shorter statutory time at the expiration of which the Common Law *prima facie* presumption of payment would arise, subject to be rebutted by evidence showing non-payment. The original view held by the English courts was that the statute was one of repose. This view was subsequently abandoned and the statute was held to be one of presumption merely. In turn this view was abandoned; and the courts returned to the original view that the contract was one of repose. In the United States the modern view of the statute is that it is one of repose.¹ Another question which must be determined in order to ascertain the true place of the statute is whether the statute is a wise measure founded on sound public policy and designed to prevent imposition by means of stale claims, and hence a defense to be treated as at least in as good standing in law as other defenses; or whether it is a technical defense devoid of merit and to be permitted only when required by the strict rules of law. In some jurisdictions limitations is treated as a defense as worthy of consideration as other defenses, and as meritorious.² It has been held proper to open a judgment rendered by an excusable default to allow the statute of limitations to be interposed as a defense.³

§1648. General effect of statute.

The statute of limitations operates as a bar to any action upon the contract; but the contract is not thereby discharged

¹ *Shepherd v. Thompson*, 122 U. S. 231; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Bauserman v. Charlott*, 46 Kan. 480; 26 Pac. 1051; *Gillingham v. Brown*, 178 Mass. 417; 55 L. R. A. 320; 60 N. E. 122.

² Thus the statute is said to be a "wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security

against stale demands after the true state of things may have been forgotten, or may be incapable of explanation by reason of the loss of evidence." *Gillingham v. Brown*, 178 Mass. 417, 421; 55 L. R. A. 320; 60 N. E. 122; substantially quoting *Bell v. Morrison*, 1 Pet. (U. S.) 351.

³ *Wheeler v. Castor*, 11 N. D. 347; 61 L. R. A. 746; 92 N. W. 381.

nor is the contract debt extinguished.¹ The remedy alone is affected.² Thus after limitations has run against the foreclosure of a mortgage, the mortgagee may nevertheless sell under a power of sale contained therein.³ This is illustrated by several classes of cases. Thus the right has still sufficient validity after the statute has run to serve as a consideration for a new promise.⁴ So if a question of the conflict of laws is involved, the statute of limitations of the forum is applied in the absence of specific statutory provision.⁵ If a cause of action is barred as to one of several joint debtors it has been held to be barred as to all.⁶ If the liability is joint and several the bar of the statute in favor of one debtor does not enure to the benefit of the other.⁷ A right of action against a surety is barred when the right of action against the principal is barred.⁸ This principle has been applied to an action against stockholders on their stock liability. Such right of action is barred when a right of action against the corporation is barred, that is in three years from the time that the corporation suspended business, even though by statute no suit could have been

¹ "A debt secured by a note upon which the right of act was barred by the statute of limitations is not thereby extinguished or paid, but the debt still remains due; and if the person can, by resorting to any other means than an action upon the note, recover his money he may do so; and this because the debt is not regarded as paid, but as still due, though not enforceable by an ordinary action at law." *Hopper v. Hopper*, 61 S. C. 124, 138; 39 S. E. 366.

² "Statutes of limitation of personal actions are laws affecting remedies only and not rights." *Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 696; *Booth v. Hoskins*, 75 Cal. 271; 17 Pac. 225; *Shaw v. Sil-loway*, 145 Mass. 503; 14 N. E. 783; *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Cocke v. Hoffman*, 5 Lea

(Tenn.) 105; 40 Am. Rep. 23. *Contra*, *McCracken County v. Trust Co.*, 84 Ky. 344; 1 S. W. 585.

³ *Menzel v. Hinton*, 132 N. C. 660; 95 Am. St. Rep. 647; 44 S. E. 385.

⁴ See §§ 320, 1673-1678.

⁵ *Amy v. Dubuque*, 98 U. S. 470; *Bacon v. Howard*, 20 How. (U. S.) 22; *Alabama Bank v. Dalton*, 9 How. (U. S.) 522; *McCluney v. Sil-liman*, 3 Pet. (U. S.) 270.

⁶ *Askly v. Bell*, 80 Va. 811.

⁷ *Harrison v. McCormick*, 122 Cal. 651; 55 Pac. 592; *Fish v. Far-well*, 160 Ill. 236; 43 N. E. 367; affirming 54 Ill. App. 457.

⁸ *Auchampaugh v. Schmidt*, 70 Ia. 642; 59 Am. Rep. 459; 27 N. W. 805; *Pacific Elevator Co. v. Whit-beck*, 63 Kan. 102; 88 Am. St. Rep. 229; 64 Pac. 984.

brought against the stockholders during the first year after such suspension.⁹ The fact that a right of action against a surety is barred by a special statute of limitations does not operate as a bar in favor of the principal.¹⁰

II. WHEN STATUTE BEGINS TO RUN.

§1649. Limitations runs from breach of contract.

The statute of limitations begins to run upon a contract at the breach thereof, as soon as a right of action accrues.¹ The important question then to determine in this connection is, when is a contract broken so that an action will lie thereon? If a contract is antedated, as where bonds were dated when authorized but issued only when needed,² limitations runs from the true date. In the absence of a special statute, limitations runs from the breach of a contract, and not from the time such breach is discovered.³ Thus limitations begins to run against an action for giving a defective abstract at the time such defective report is made; though party to whom such report is made, who buys land in reliance thereon, is not deprived of such land until a suit is brought after the period of limitations against the cause of action for giving the defective abstract has expired.⁴ So a right of action on a warranty given with the sale of a defective town warrant accrues when such warrant is sold, and

⁹ *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102; 88 Am. St. Rep. 229; 64 Pac. 984.

¹⁰ *Berkin v. Marsh*, 18 Mont. 152; 56 Am. St. Rep. 565; 44 Pac. 528.

¹ *Williams v. Bergin*, 116 Cal. 56; 47 Pac. 877; *Lattin v. Gillette*, 95 Cal. 317; 29 Am. St. Rep. 115; 30 Pac. 545; *Standard Sewing-Machine Co. v. Frame*, 2 Penne. (Del.) 430; 48 Atl. 188; *Hale v. Cushman*, 96 Me. 148; 51 Atl. 874; *Manning v. Perkins*, 86 Me. 419; 29 Atl. 1114; *Watson v. Heyn*, 62 Neb. 191; 86 N. W. 1064; *McLure v. Melton*, 34

S. C. 377; 27 Am. St. Rep. 820; 13 L. R. A. 723; 13 S. E. 615; *Cummings v. Stovall*, 6 Lea (Tenn.) 679; *Merchants' National Bank v. Spates*, 41 W. Va. 27; 56 Am. St. Rep. 828; 23 S. E. 681.

² *Sechrist v. Irrigation District*, 129 Cal. 640; 62 Pac. 261.

³ *Ganser v. Ganser*, 83 Minn. 199; 85 Am. St. Rep. 461; 86 N. W. 18.

⁴ *Lattin v. Gillette*, 95 Cal. 317; 29 Am. St. Rep. 115; 30 Pac. 545. See *Russell v. Abstract Co.*, 87 Ia. 233; 43 Am. St. Rep. 381; 54 N. W. 212.

not when its invalidity is subsequently discovered, there being no fraudulent concealment.⁵ If the damage occasioned by the breach of contract is not sustained until after the contract is broken, limitations begins to run from the date of the breach, and not from the time that damage is sustained.⁶ Thus an attorney agreed to collect a note for a client. He neglected to bring suit against a solvent indorser for over a year; and in bringing such suit finally, he committed a fatal misnomer of the plaintiff, for which a judgment against the indorser was reversed by the Supreme Court of the state. By that time the action against the indorser was barred by limitations. Suit was then brought by the holder of the note against the attorney for breach of his implied agreement to use due skill and diligence, one count alleging that no suit was brought until the note was barred and the other count alleging that the suit was defectively brought. It was held that limitations began to run against the first cause of action on failure to sue within a reasonable time after the note was received for collection, or at least after failure to collect from the maker, and against the second cause of action from the time that the blunder in pleading was made.⁷ So limitations runs against an innocent breach of trust from its date and not from discovery.⁸ Limitations begins to run against a domestic judgment from the date of its rendition, and not from the end of the period during which execution might issue.⁹

⁵ *Merchants' National Bank v. Spates*, 41 W. Va. 27; 56 Am. St. Rep. 828; 23 S. E. 681.

⁶ *Lattin v. Gillette*, 95 Cal. 317; 29 Am. St. Rep. 115; 30 Pac. 545; *Davis v. Brown*, 98 Ky. 475; 32 S. W. 614; 36 S. W. 534; *Manning v. Perkins*, 86 Me. 419; 29 Atl. 1114; *Everett v. O'Leary*, 90 Minn. 154; 95 N. W. 901; *Northern Assurance Co. v. Borgelt*, — Neb. —; 93 N. W. 226; *McLure v. Melton*, 34 S. C. 377; 27 Am. St. Rep. 820; 13 L. R. A. 723; 13 S. E. 615.

⁷ *Wilcox v. Plummer*, 4 Pet. (U. S.) 172.

⁸ *Thorne v. Heard* (1894), 1 Ch. 599.

⁹ *Citizens' National Bank v. Lucas*, 26 Wash. 417; 90 Am. St. Rep. 748; 56 L. R. A. 812; 67 Pac. 252. (This involves the doctrine that at Common Law the right of action on a judgment existed as soon as the judgment was rendered; and that execution is a cumulative statutory remedy.)

§1650. Contract to be performed at future time or event.

If a future definite time is fixed for the performance of the contract, limitations does not begin to run until such future time is reached.¹ Thus under a contract to pay money at a definite time in the future limitations does not begin to run until such time is reached.² If the law allows days of grace limitations runs from the last day of grace.³ So limitations begins to run against the liability of directors and officers of a corporation for creating indebtedness in excess of the capital stock from the date of the maturity of such debt and not from its creation.⁴ Limitations runs against a vendor's lien from the maturity of the debt and not from the date of the conveyance.⁵ Limitations runs against interest coupons from their maturity and not from the maturity of the debt.⁶ If a contract is to be performed on the happening of some future event, the time of which cannot be determined in advance, limitations does not begin until the happening of such event. Under a subscription to a railroad payable when it is completed⁷ or a contract to pay for work when certain land is sold⁸ limitations runs from such events. Thus limitations does not run against a debt to be paid on the death of the debtor⁹ or on the death of another¹⁰ until such death. So a contract to make a will is not broken until the death of the promisor, and limitations does not run till

¹ *Richter v. Union Land and Stock Co.*, 129 Cal. 367; 62 Pac. 39; *Pinch v. McCulloch*, 72 Minn. 71; 74 N. W. 897.

² *French v. Higgins*, 66 N. J. L. 579; 50 Atl. 344.

³ *Joergenson v. Joergenson*, 28 Wash. 477; 92 Am. St. Rep. 888; 68 Pac. 913.

⁴ *Woolverton v. Taylor*, 132 Ill. 197; 22 Am. St. Rep. 521; 23 N. E. 1007.

⁵ *Poindexter v. Rawlings*, 106 Tenn. 97; 82 Am. St. Rep. 869; 59 S. W. 766.

⁶ *Mather v. San Francisco*, 115 Fed. 37; 52 C. C. A. 631.

⁷ *McClaine v. Fairchild*, 23 Wash. 758; 63 Pac. 517.

⁸ *Thompson v. Orena*, 134 Cal. 26; 66 Pac. 24.

⁹ *Stanley's Estate v. Pence*, 160 Ind. 636; 66 N. E. 51; rehearing denied, 160 Ind. 645; 67 N. E. 441; *Bennett v. Lutz*, 119 Ia. 215; 93 N. W. 288; *Davis v. Teachout*, 126 Mich. 135; 86 Am. St. Rep. 531; 85 N. W. 475.

¹⁰ *Perkins v. Siegfried's Admr.*, 97 Va. 444; 34 S. E. 64.

then¹¹ whether the action is for damages¹² or for a reasonable compensation for services rendered under such contract.¹³ In order that limitations may run from some time in the future, the contract whereby payment is deferred must be enforceable and must be the basis of the action. A agreed orally to adopt B and devise realty to him, and in reliance on such promise B worked for A until B came of age. As the contract was unenforceable by reason of the statute of frauds, B's sole claim was for a reasonable compensation for his services, and hence limitations begun to run when B stopped rendering such services.¹⁴ If performance is to be made at some time in the future but no time is fixed therefor, a reasonable time is ordinarily presumed to have been intended, and in such cases limitations runs from such reasonable time.¹⁵ In analogy to this rule if a debt is payable on the happening of a certain event in the control of the creditor he cannot defer the running of the statute indefinitely by preventing such event from happening. Thus if a note is given payable when the payee shall remove certain liens, he cannot postpone the operation of the statute by omitting to remove such liens.¹⁶ If a loan is made and no time of payment is specified, limitations begins to run as soon as the loan is made, since in legal effect such loan is payable at once.¹⁷ It is treated like a debt payable on demand.¹⁸ So if no time is fixed

¹¹ *Gullett v. Gullett*, 28 Ind. App. 670; 63 N. E. 782; *Morrissey v. Morrissey*, 180 Mass. 480; 62 N. E. 972; *In re Hess*, 57 Minn. 282; 59 N. W. 193; *Stone v. Todd*, 49 N. J. L. 274; 8 Atl. 300; *Cann v. Cann*, 45 W. Va. 563; 31 S. E. 923; s. c., 40 W. Va. 138; 20 S. E. 910.

¹² *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46; 5 So. 572.

¹³ *Kauss v. Rohner*, 172 Pa. St. 481; 51 Am. St. Rep. 762; 33 Atl. 1016.

¹⁴ *Martin v. Martin's Estate*, 108

Wis. 284; 81 Am. St. Rep. 895; 84 N. W. 439.

¹⁵ *Muscatine v. Ry.*, 79 Ia. 645; 44 N. W. 909; *Cummings v. Stovall*, 6 Lea (Tenn.) 679.

¹⁶ *Barnes v. Hardware Co.*, 203 Pa. St. 570; 53 Atl. 378.

¹⁷ *Newhall v. Sherman*, 124 Cal. 509; 57 Pac. 387; *Teasley v. Bradley*, 110 Ga. 497; 78 Am. St. Rep. 113; 35 S. E. 782; *Howard v. Church*, 51 Mich. 125; 16 N. W. 307; *Ervin v. Brooks*, 111 N. C. 358; 16 S. E. 240; *Caldwell v. Rodman*, 5 Jones L. (N. C.) 139.

¹⁸ See § 1653.

for payment, the purchase price of realty is due at once and limitations runs from the conveyance.¹⁹

§1651. Necessity of demand.

Whether demand is necessary to start the statute to running is a question presenting considerable difficulty. If the demand is an essential part of the cause of action limitations does not run until such demand is made.¹ A note payable in work or property cannot be the basis of an action until demand has been made; and accordingly limitations does not run until that time.² So limitations does not run against a bond to furnish support until demand and refusal.³ The statute does not run against liability on subscriptions to corporate stock, payable on call, until a call is made.⁴ If the corporation has become insolvent and its affairs are being wound up by a court of equity, limitations is sad to run from the order of the court that a call should be made⁵ or in some courts as far as the claims of the creditors are concerned, from the time that the corporation becomes avowedly insolvent.⁶ It has been held that the right of action against an officer of a corporation which has gone out of business begins when such corporation is dissolved, and is not postponed by omission to make demand even though such demand is a condi-

¹⁹ *Hemmingway v. Tong* (Ky.), 66 S. W. 278.

¹ *Thomas v. Beach Co.*, 115 Cal. 136; 46 Pac. 899; *Owen v. Higgins*, 113 Ia. 735; 84 N. W. 713; *Bank of Louisville v. Gray*, 84 Ky. 565; 2 S. W. 168; *Horton v. Seymour*, 32 Minn. 535; 85 N. W. 551; *Stevens v. Rogers*, 16 Utah 105; 51 Pac. 261.

² *Lincoln v. Purcell*, 2 Head. (Tenn.) 143; 73 Am. Dec. 196.

³ *Portner v. Wilfahrt*, 85 Minn. 73; 88 N. W. 418.

⁴ *Glenn v. Liggett*, 135 U. S. 533; *Hawkins v. Glenn*, 131 U. S. 319; *Seovill v. Thayer*, 105 U. S. 143; *Vermont Marble Co. v. Granite Co.*,

135 Cal. 579; 87 Am. St. Rep. 143; 56 L. R. A. 728; 67 Pac. 1057.

⁵ *Glenn v. Marbury*, 145 U. S. 499; *Glenn v. Williams*, 60 Md. 93.

⁶ *West v. Bank*, 66 Kan. 524; 63 L. R. A. 137; 72 Pac. 252; *Washington Savings Bank v. Bank*, 107 Mo. 133; 28 Am. St. Rep. 405; 17 S. W. 644. (In this case time was extended by issuing to the creditor's of the corporation scrip representing the indebtedness payable in three years.) The question was left undecided in *Thompson v. Bank*, 19 Nev. 171; 3 Am. St. Rep. 881, as the time had not expired on either theory.

tion precedent to an action.⁷ So though demand is a condition precedent to an action for a dividend,⁸ or, by statute, on swamp land warrants⁹ limitations begins to run when the right to make demand accrues, and is not postponed by omission to make demand.

§1652. Deposits, certificates of deposit and checks.

Limitations does not run against the right of a general depositor to recover from a bank until demand upon the bank has been made;¹ nor does it run against a similar deposit in the hands of an individual not a banker, subject to the order of the depositor.² So between a principal and an agent authorized to hold money collected by him to his principal's order,³ or between a husband who has put money into his wife's hands, and such wife,⁴ limitations does not run till demand. A certificate of deposit is usually made payable on return of the certificate properly indorsed. Accordingly some courts have held that such a certificate must be so returned and demand made before limitations begins to run;⁵ while other authorities treat

⁷ *Landis v. Saxton*, 105 Mo. 486; 24 Am. St. Rep. 403; 16 S. W. 912.

⁸ *Winchester, etc., Turnpike Co. v. Wickliffe*, 100 Ky. 531; 66 Am. St. Rep. 356; 38 S. W. 866.

⁹ *Barnes v. Glide*, 117 Cal. 1; 59 Am. St. Rep. 153; 48 Pac. 804.

¹ *Munnerlyn v. Bank*, 88 Ga. 333; 30 Am. St. Rep. 159; 14 S. E. 554; *Campbell v. Whoriskey*, 170 Mass. 63; 48 N. E. 1070; *Citizens' Bank v. Fromholz*, 64 Neb. 284; 89 N. W. 775; *Bank of British North America v. Bank*, 91 N. Y. 106; *Thomson v. Bank*, 82 N. Y. 1; *Tobin v. McKinney*, 14 S. D. 52; 91 Am. St. Rep. 688; 84 N. W. 228; affirmed on rehearing, 15 S. D. 257; 91 Am. St. Rep. 694; 88 N. W. 572; *Goodell v. Bank*, 63 Vt. 303; 25 Am. St. Rep. 766; 21 Atl. 956.

² *Gutch v. Fosdick*, 48 N. J. Eq. 353; 27 Am. St. Rep. 473; 22 Atl. 590; *Goodwin v. Ray*, 108 Tenn. 614; 91 Am. St. Rep. 761; 69 S. W. 730. So as to a deposit of money in lieu of bail. (*City of*) *Savannah v. Kassell*, 115 Ga. 310; 41 S. E. 572.

³ *Cole v. Baker*, — S. D. —; 91 N. W. 324.

⁴ *Rucker v. Maddox*, 114 Ga. 899; 41 S. E. 68. And see *Fennell v. Drinkhouse*, 131 Cal. 447; 82 Am. St. Rep. 361; 63 Pac. 734.

⁵ *Brown v. McElroy*, 52 Ind. 404; *Bank v. Harrison*, — N. M. —; 66 Pac. 460; *Pardee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176; *Smiley v. Fry*, 100 N. Y. 262; 3 N. E. 186; *McGough v. Jamison*, 107 Pa. St. 336; *Tobin v. McKinney*, 14 S. D. 52; 91 Am. St. Rep. 688; 84 N.

it as equivalent to a demand note, and hold that limitations runs from its date.⁶ A check is payable on demand, and as in the case of a demand note limitations is held to run from its date,⁷ or at least after a reasonable time has elapsed within which such check can be presented for payment.⁸

§1653. Contract to be performed "on demand."

Limitations runs against an ordinary note payable "on demand" from the date of the note and not from the date of the demand.¹ The same rule applies to a note to be paid when called for,² or to one payable on demand after date.³ Some authorities hold that demand is necessary in such cases.⁴ In computing the time for which limitations has run on a demand note the date of the payment extending the running of limitations is to be excluded.⁵ The application of this principle is of course not limited to notes but extends to all contracts to pay or perform on demand.⁶ If the note shows that demand

W. 228; affirmed on rehearing, 15 S. D. 257; 91 Am. St. Rep. 694; 88 N. W. 572; Bellows Falls Bank v. Bank, 40 Vt. 377.

⁶ Brummagin v. Tallant, 29 Cal. 503; 89 Am. Dec. 61; Hunt v. Divine, 37 Ill. 137; Mereness v. Bank, 112 Ia. 11; 84 Am. St. Rep. 318; 83 N. W. 711; Mitchell v. Easton, 37 Minn. 335; 33 N. W. 910; Curran v. Witter, 68 Wis. 16; 60 Am. Rep. 827; 31 N. W. 705.

⁷ Blades v. Bank (Ky.), 56 S. W. 415.

⁸ Scroggin v. McClelland, 37 Neb. 644; 40 Am. St. Rep. 520; 22 L. R. A. 110; 56 N. W. 208.

¹ O'Neil v. Magner, 81 Cal. 631; 15 Am. St. Rep. 88; 22 Pac. 876; Old Alms-House Farm v. Smith, 52 Conn. 434; Blethen v. Murch, 80 Me. 313; 14 Atl. 208; Seward v. Hayden, 150 Mass. 158; 15 Am. St. Rep. 183; 5 L. R. A. 844; 22 N. E. 629; Mills v. Davis, 113 N. Y. 243;

3 L. R. A. 394; 21 N. E. 68; Hill v. Henry, 17 Ohio 9; Smith v. Bell, 107 Pa. St. 352; Collier v. Gray, 1 Overt. (Tenn.) 110. So of other contracts. Douglass v. Sargent, 32 Kan. 413; 4 Pac. 861.

² Kraft v. Thomas, 123 Ind. 513; 18 Am. St. Rep. 345; 24 N. E. 346.

³ Fenno v. Gay, 146 Mass. 118; 15 N. E. 87.

⁴ Due-bill payable on demand. Nash v. Woodward, 62 S. C. 418; 40 S. E. 895. A note payable "on demand as he may want to use the same." Stanton v. Stanton, 37 Vt. 411. Order drawn by school-district payable on demand. Blaisdell v. School District, 72 Vt. 63; 47 Atl. 173.

⁵ Seward v. Hayden, 150 Mass. 158; 15 Am. St. Rep. 183; 5 L. R. A. 844; 22 N. E. 629.

⁶ Loan. Hall v. Letts, 21 Ia. 596. Mortgage. Martin v. Stoddard, 127

was really contemplated by the parties before liability should attach, such demand must be made before limitations begins to run. Thus limitations does not begin to run until demand in case of a note payable at a certain time after demand.⁷ So a contract of guaranty which binds the guarantor to pay certain sums on thirty days' notice is one on which no right of action accrues and limitations does not begin to run until thirty days after demand.⁸ So limitations does not run against a note given for corporate stock "payable in such installments and at such times as the directors may require,"⁹ or made payable on call by some similar form of expression¹⁰ until demand has been made.

If demand is properly made and refused,¹¹ as in case of demand for performance of a contract to transfer stock,¹² or demand for the payment of a certified check,¹³ limitations begins to run. Demand upon one joint contractor and his refusal starts limitations to running in favor of all.¹⁴ A demand made and withdrawn before refusal does not start limitations to running.¹⁵

§1654. Payment in installments.

If a debt is payable in installments the statute of limitations begins to run as to each separate installment from its maturity.¹

N. Y. 61; 27 N. E. 285. County warrant. *Crudup v. Ramsey*, 54 Ark. 168; 15 S. W. 458.

⁷ *Cooke v. Pomeroy*, 65 Conn. 466; 32 Atl. 935; *Codman v. Rogers*, 10 Pick. (Mass.) 112; *Wenman v. Ins. Co.*, 13 Wend. (N. Y.) 267; 28 Am. Dec. 464.

⁸ *Hooper v. Hooper*, 81 Md. 155; 48 Am. St. Rep. 496; 31 Atl. 508.

⁹ *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306; 76 Am. St. Rep. 771; 45 Atl. 221. See to the same effect, *Bigelow v. Libby*, 117 Mass. 359; *Langworthy v. Flouring Mills Co.*, 77 Minn. 256; 79 N. W. 974; *Kilbreath v. Gaylord*, 34 O. S. 305; *Crafoot v. Thatcher*, 19 Utah 212;

75 Am. St. Rep. 725; 57 Pac. 171.

¹⁰ *Wardle v. Hudson*, 96 Mich. 432; 55 N. W. 992; *Eichman v. Hersker*, 170 Pa. St. 402; 33 Atl. 229.

¹¹ *Mifflin County National Bank v. Bank*, 199 Pa. St. 459; 49 Atl. 213.

¹² *Rhind v. Hyndman*, 54 Md. 527; 39 Am. Rep. 402.

¹³ *Blades v. Bank (Ky.)*, 56 S. W. 415.

¹⁴ *Rhind v. Hyndman*, 54 Md. 527; 39 Am. Rep. 402. (Contract for sale of stock.)

¹⁵ *Lydig v. Braman*, 177 Mass. 212; 58 N. E. 696.

¹ *Staffon v. Lyon*, 110 Mich. 260;

So if several notes are secured by one mortgage, limitations runs as to each note from its maturity.² If the note or other instrument contains a provision that default in payment of an installment should make the entire debt due forthwith, without providing that default should have such effect at the option of the creditor, such default is held to start the statute of limitations to running.³ If the provision is that in case of default in one installment the entire debt shall become due at the option of the creditor, the statute of limitations does not begin to run until he has exercised his option, and thus made the entire debt fall due.⁴ If the note provides that "in default of payment of interest when due the principal is to become due and collectible," but recites that it is secured by a deed of trust; and the deed provided that in case of default the entire debt should become due "at the option" of the holder of the notes, it is held that limitations does not begin to run unless the holder of the notes elects to treat the entire debt as due.⁵ A provision that default in payment of one installment shall make future installments due and payable at once,⁶ or that default in paying taxes on mortgaged property shall make the mortgage debt due at once,⁷ may be waived by the conduct of the parties if each leads the other to believe that the default

68 N. W. 151; *Nares v. Bell*, — Neb. —; 92 N. W. 571; *Bush v. Stowell*, 71 Pa. St. 208; 10 Am. Rep. 694; *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306; 76 Am. St. Rep. 771; 45 Atl. 221; *George v. Butler*, 26 Wash. 456; 57 L. R. A. 396; 67 Pac. 263.

² *George v. Butler*, 26 Wash. 456; 90 Am. St. Rep. 756; 57 L. R. A. 396; 67 Pac. 263.

³ *Reed v. Culp*, 63 Kan. 595; 66 Pac. 616; *Ryan v. Caldwell*, 106 Ky. 543; 50 S. W. 966; *San Antonio, etc., Association v. Stewart*, 94 Tex. 441; 86 Am. St. Rep. 864; 61 S. W. 386; *Harrison Machine Works v. Reigor*, 64 Tex. 89; *Dodge v. Signor*, 18 Tex. Civ. App. 45; 44 S. W. 926.

⁴ *Moline Plow Co. v. Webb*, 141 U. S. 616; *Richards v. Daly*, 116 Cal. 336; 48 Pac. 220; *Mason v. Luce*, 116 Cal. 232; 48 Pac. 72; *Ins. Co. v. Martin*, 151 Ind. 209; 51 N. E. 361; *Watts v. Creighton*, 85 Ia. 154; 52 N. W. 12; *Lowenstein v. Phelan*, 17 Neb. 429; 22 N. W. 561; *Batey v. Walter* (Tenn. Ch. App.), 46 S. W. 1024.

⁵ *Moline Plow Co. v. Webb*, 141 U. S. 616.

⁶ *San Antonio, etc., Association v. Stewart*, 94 Tex. 441; 86 Am. St. Rep. 864; 61 S. W. 386.

⁷ *Douthitt v. Farrell*, 60 Kan. 195; 56 Pac. 9.

will not be insisted on,⁸ or by the voluntary payment by the debtor of all delinquencies, the creditor acquiescing therein,⁹ so that limitations does not run from such default. Even if the holder of the note after default in payment of interest presents the entire amount of principal and interest as a claim for the amount due at that time, which is before the maturity of the note, such presentation is not an exercise of the right to treat the entire amount as due, or if it is, his subsequent acquiescence in the continued running of the debt waives such right.¹⁰ Such a waiver affects the time at which limitations begins to run, and is not a new promise or acknowledgment; and hence may be oral even if the statute requires a new promise or acknowledgment to be in writing.¹¹ Some authorities treat a provision giving the creditor power to enforce the debt in case of default in one installment as a power which makes limitations run from default even if the creditor does not exercise such power. Thus a loan for five years was made with power to the creditor to call the loan if the interest which was due quarterly not paid within twenty-one days after it came due. Default in payment of interest was held to start limitations to running twenty-one days after the day on which the quarterly installment of interest in which default was made fell due.¹² The creditor's act in bringing suit on the entire debt is an exercise of his option to declare it all due, though such suit is dismissed after his death.¹³

§1655. Accounts and continuing contracts.

If an account is a unit, by the mutual dealings of the parties thereto, it is not barred until the last item thereof is barred.¹

⁸ San Antonio, etc., Association v. Stewart, 94 Tex. 441; 86 Am. St. Rep. 864; 65 S. W. 665.

⁹ California, etc., Society v. Culver, 127 Cal. 107; 59 Pac. 292; Douthitt v. Farrell, 60 Kan. 195; 56 Pac. 9.

¹⁰ Moore v. Russell, 133 Cal. 297; 85 Am. St. Rep. 166; 65 Pac. 624.

¹¹ San Antonio, etc., Association

v. Stewart, 94 Tex. 441; 86 Am. St. Rep. 864; 65 S. W. 665.

¹² Reeves v. Butcher (1891), 2 Q. B. 509; following Hemp v. Garland, 4 Q. B. 519.

¹³ Westcott v. Whiteside, 63 Kan. 49; 64 Pac. 1032.

¹ Carpenter v. Plagge, 192 Ill. 82; 61 N. E. 530; Padden v. Clark. — Ia. —; 99 N. W. 152; Rickard v.

If there are, however, two separate and distinct accounts between the same parties, each is barred when the last item is barred; and the later one cannot be added to the earlier one to extend the period of limitations as to the earlier.² So the fact that the debtor delivers to the creditor an article to be applied on account does not make the account between them a mutual one.³ Agreement between the parties to a mutual account fixing the amount due thereon and making it an account stated is in legal effect a new promise and starts limitations to running anew.⁴ Carrying a balance due on an earlier account into a subsequent account by mutual agreement makes it subject to the limitation applicable to the second account.⁵ Limitations does not run against a continuing contract,⁶ as one between a sheriff and his deputy,⁷ or a contract to work for compensation, no time being specified either for payment or for the termination of the contract⁸ until the end thereof. So breach by a railway company of its contract to keep up a crossing is a continuing breach.⁹

§1656. Debt payable out of specific fund.

The statute does not begin to run against a claim against a public corporation or quasi-corporation,¹ such as a

Geach, 26 Nev. 444; 69 Pac. 861; The Victorian, 24 Or. 121; 41 Am. St. Rep. 838; 32 Pac. 1040; Hay v. Peterson, 6 Wyom. 419; 34 L. R. A. 581; 45 Pac. 1073.

² Graham v. Stanton, 177 Mass. 321; 58 N. E. 1023; Moore v. Blackman, 109 Wis. 528; 85 N. W. 429.

³ Miller v. Cinnamon, 168 Ill. 447; 48 N. E. 45; reversing 61 Ill. App. 429.

⁴ Kahn v. Edwards, 75 Cal. 192; 7 Am. St. Rep. 141; 16 Pac. 779.

⁵ Ready v. McDonald, 128 Cal. 663; 79 Am. St. Rep. 76; 61 Pac. 272.

⁶ Schoonover v. Vachon, 121 Ind. 3; 22 N. E. 777; McCay v. McDowell, 80 Ia. 146; 45 N. W. 730; Mor-

rissey v. Faucett, 28 Wash. 52; 68 Pac. 352; Douglass v. Ry., 51 W. Va. 523; 41 S. E. 911; Rowan v. Chenoweth, 49 W. Va. 287; 87 Am. St. Rep. 796; 38 S. E. 544.

⁷ Rowan v. Chenoweth, 49 W. Va. 287; 87 Am. St. Rep. 796; 38 S. E. 544.

⁸ Morrissey v. Faucett, 28 Wash. 52; 68 Pac. 352.

⁹ Douglass v. Ry., 51 W. Va. 523; 41 S. E. 911.

¹ New Orleans v. Warner, 175 U. S. 120; Sawyer v. Colgan, 102 Cal. 283; 36 Pac. 580; Davis v. Simpson, 25 Nev. 123; 83 Am. St. Rep. 570; 58 Pac. 146; Brannon v. White Lake Township, — S. D. —; 95 N. W. 284; Potter v. New Whatcom,

city,² or county,³ or township,⁴ which is enforceable only out of a particular fund, and not against the corporation generally, until such fund has been provided. If a warrant is issued by a public corporation payable out of a specified fund, limitations does not begin to run against such warrant until the money is in the treasury to the credit of such fund.⁵ It has been held apparently by some authorities that the proper officer of the corporation must give notice to the creditor of the existence and sufficiency of such fund, in order to start the statute of limitations to running.⁶ This principle is not, however, limited to public corporations. It applies to all contracts to make a payment out of a specific fund, such as a promise to pay a debt out of the proceeds of certain property,⁷ or the contract of a building and loan association to pay retiring stockholders out of funds of a certain class.⁸ In such cases limitations does not begin to run until the fund from which such payment is to be made comes into existence.

§1657. Official bonds.

Limitations begins to run on the bond of an administrator when the court renders a decree showing the balance due based upon the administrator's report.¹ Until his account is filed and acted upon limitations does not run, and his failure to file such account does not set limitations to running in his

20 Wash. 589; 72 Am. St. Rep. 135; 56 Pac. 394.

² New Orleans v. Warner, 175 U. S. 120; Potter v. New Whatcom. 20 Wash. 589; 72 Am. St. Rep. 135; 56 Pac. 394.

³ Wetmore v. Monona County, 73 Ia. 88; 34 N. W. 751; Davis v. Simpson, 25 Nev. 123; 83 Am. St. Rep. 570; 58 Pac. 146.

⁴ Brannon v. White Lake Township, — S. D. —; 95 N. W. 284.

⁵ Grayson v. Latham, 84 Ala. 546; 4 So. 200, 866; Wetmore v. Monona County, 73 Ia. 88; 34 N. W. 751; Hubbell v. South Hutchin-

son, 64 Kan. 645; 68 Pac. 52; Fernandez v. New Orleans, 46 La. Ann. 1130; 15 So. 378.

⁶ Potter v. New Whatcom. 20 Wash. 589; 72 Am. St. Rep. 135; 56 Pac. 394.

⁷ Brown v. Hitchcock, 69 Vt. 197; 37 Atl. 292; Sayers v. Sayers, 90 Va. 755; 19 S. E. 844.

⁸ Andrews v. Roanoke Building Association & Inv. Co., 98 Va. 445; 36 S. E. 531.

¹ Williams v. Flippin, 68 Miss. 680; 24 Am. St. Rep. 297; 10 So. 52; Mortenson v. Bergthold, 64 Neb. 208; 89 N. W. 742.

favor.² On a guardian's bond limitations runs from the death of the ward, as to the sureties; even though no action can be brought on the bond until the guardian files his final report and this is confirmed.³ Limitations does not begin to run on the bond of a public officer until his term of office, for which such bond was given has expired; even if the wrongful conversion took place some time before.⁴

§1658. Trust funds.

If a fund is received under an express trust, the possession of the trustee is rightful, and no cause of action exists against him until he renounces the trust. The statute of limitations begins to run, therefore, at the date of such renunciation and not at the date that the fund is received.¹ Thus a contract whereby a married woman releases her dower in consideration that the grantee will hold one ninth of the proceeds of the land for her is one against which limitations runs from the disavowal of the trust and not from the date of the sale.² So it has been held that if an executor gives to his co-executor his note and mortgage for funds received by him from the estate, limitations does not run until such executor repudiates the trust.³ If a city has collected a special fund to pay certain warrants, limitations does not run until it repudiates its obligation and diverts such fund, to the knowledge of the creditor.⁴ So a factor having

²*In re Saunderson*, 74 Cal. 199; 15 Pac. 753; *McLaughlin v. Daniel*, 8 Dana (Ky.) 182.

³*Berkin v. Marsh*, 18 Mont. 152; 56 Am. St. Rep. 565; 44 Pac. 528.

⁴*People v. Van Ness*, 79 Cal. 84; 12 Am. St. Rep. 134; 21 Pac. 554.

¹*New Orleans v. Warner*, 175 U. S. 120; *Williams v. Young*, 71 Ark. 164; 71 S. W. 669; *White v. Costigan*, 138 Cal. 564; 72 Pac. 178; *Faylor v. Faylor*, 136 Cal. 92; 68 Pac. 482; *Fox v. Tay*, 89 Cal. 339; 23 Am. St. Rep. 474; 24 Pac. 855; 26 Pac. 897; *Stanley's Estate v.*

Pence, 160 Ind. 636; 66 N. E. 51; rehearing denied, 160 Ind. 645; 67 N. E. 441; *Talbott v. Barber*, 11 Ind. App. 1; 54 Am. St. Rep. 491; 38 N. E. 487; *Irwin v. Holbrook*, 26 Wash. 89; 66 Pac. 116.

²*Talbott v. Barber*, 11 Ind. App. 1; 54 Am. St. Rep. 491; 38 N. E. 487.

³*Fox v. Tay*, 89 Cal. 339; 23 Am. St. Rep. 474; 24 Pac. 855; 26 Pac. 897.

⁴*New Orleans v. Warner*, 170 U. S. 120; *New York, etc., Co. v. Tacoma*, 30 Wash. 661; 71 Pac. 194.

in his possession funds of his principal with authority to invest and reinvest them is a trustee within the meaning of this rule, so that limitations does not run in his favor until demand and refusal.⁵ An agent is not ordinarily a trustee for his principal within the meaning of this rule. Money held by the secretary of a corporation which has gone out of business is not held in trust within the meaning of this rule; and limitations runs from the dissolution of the corporation.⁶ If an agent having merely authority to collect and pay over to his principal collects money belonging to his principal, limitations runs in his favor from the time that the principal knows that such collection has been made.⁷ This rule applies to money collected by an attorney for his client, there being no fraudulent concealment of the fact of collection.⁸ On the other hand, limitations begins to run at the time of the breach of trust,⁹ even if such breach consists in lending trust funds on insufficient security and no loss is suffered until long after.¹⁰ In an implied trust, created by the operation of the law, and not by the agreement of the parties, limitations begins to run at once.¹¹

§1659. Quasi-contract.

The statute of limitations runs against the right to recover money paid by mistake when such payment is made, and not from the time that demand is made.¹ Thus if a forged check

⁵ *Teasley v. Bradley*, 110 Ga. 497;
78 Am. St. Rep. 113; 35 S. E.
782.

⁶ *Landis v. Saxton*, 105 Mo. 486;
24 Am. St. Rep. 403; 16 S. W.
912.

⁷ *Teasley v. Bradley*, 110 Ga. 497;
78 Am. St. Rep. 113; 35 S. E.
782.

⁸ *Douglas v. Corry*, 46 O. S. 349;
15 Am. St. Rep. 604; 21 N. E. 440.

⁹ *Thorne v. Heard* (1894), 1 Ch.
599.

¹⁰ *In re Somerset* (1894), 1 Ch.
231.

¹¹ *Barker v. Hurley*, 132 Cal. 21;
63 Pac. 1071; *Redford v. Clarke*,
100 Va. 115; 40 S. E. 630; *Beecher*
v. Foster, 51 W. Va. 605; 42 S. E.
647; *Buttles v. De Baun*, 116 Wis.
323; 93 N. W. 5.

¹ *Bree v. Holbech*, 2 Doug. 654;
Bank of the United States v. Dan-
iel, 12 Pet. (U. S.) 32; *Sturgis v.*
Preston, 134 Mass. 372; *Murphy v.*
Omaha, 1 Neb. (Unofficial) 488; 95
N. W. 680.

is paid by mistake, limitations runs from the date of payment.² Limitations runs against a surety's right to exoneration by his principal³ from the time that he pays the debt and not from the date of the debt. So the right of an indorser to exoneration from the principal debtor,⁴ or to contribution from joint indorsers,⁵ begins only when he has paid the debt or more than his share of it, and limitations runs from that time. If in case of conversion the injured party elects to waive the tort and sue in assumpsit, limitations runs from the time that the wrong-doer receives from his vendee the money for which the injured party sues,⁶ provided that such sale is made and such money is received before the injured party's right of action against the wrong doer has been barred by limitations and title has thus been perfected in the wrong doer.

III. EXCEPTIONS TO STATUTE.

§1660. Exceptions to statute must be statutory.

Since the rule, that no action can be brought upon certain specified causes of action after specified times is a statutory rule, it follows that any exceptions thereto on account of the disability of either party, or of special hardships arising out of particular cases, must be made by statute.¹ The court has no right to create an exception to such a statutory rule, to conform to its own ideas of justice.² Such considerations should be addressed to the legislature, and not to the courts.

² *Leather Manufacturers' Bank v. Bank*, 128 U. S. 26.

³ *Loewenthal v. Coonan*, 135 Cal. 381; 87 Am. St. Rep. 115; 67 Pac. 324.

⁴ *Strauss v. Denny*, 95 Md. 690; 53 Atl. 571.

⁵ *Bunker v. Osborn*, 132 Cal. 480; 64 Pac. 853; *Camp v. Bostwick*, 20 O. S. 337; 5 Am. Rep. 669.

⁶ *Miller v. Miller*, 7 Pick. (Mass.) 133; 19 Am. Dec. 264.

¹ "The exemptions from the operation of statutes of limitation usu-

ally accorded to infants and married women do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon language in those statutes giving them time after majority or after cessation of coverture to assert their rights." *Vance v. Vance*, 108 U. S. 514, 521.

² *Davis v. Hart*, 123 Cal. 384; 55 Pac. 1060; *Hibernian Banking Association v. Bank*, 157 Ill. 524; 41 N. E. 919; 41 N. E. 918; *Miller v.*

Accordingly, in the absence of a statute specifically providing therefor, the fact that the plaintiff does not know of the existence of the cause of action in his favor,³ or does not know that it is possible to serve the defendant with process,⁴ or the fact that the plaintiff is so poor as to be practically unable to institute litigation;⁵ or that he is unable to obtain evidence sufficient to establish his case,⁶ or is unable to file his claim against the United States in the Court of Claims because of the aid which he gave to the rebellion,⁷ or that the defendant was imprisoned,⁸ none of them prevent the statute of limitations from running in favor of the defendant against the plaintiff. So in the absence of statutory provision therefor, the fact that the defendant makes it practically impossible to commence the action, as by concealing himself so that process cannot be served upon him,⁹ or otherwise evading the service of process, does not prevent limitations from running in favor of the defendant. In many states, however, the statutes cover at least the more extreme and objectionable kinds of conduct of the defendant delaying or preventing litigation. A demand by the creditor upon the debtor,¹⁰ or upon the executor of the debtor,¹¹ does not of itself stop the running of the statute. A denial by a bank of liability on a lost certificate of deposit does not prevent limitations from running though the bank knows that it is liable.¹² So the creditor's attempt to avoid the transac-

Lesser, 71 Ia. 147; 32 N. W. 250; Collins v. Pease, 146 Mo. 135; 47 S. W. 925; Parker v. Kelly, 61 Wis. 552; 21 N. W. 539.

³ Lattin v. Gillette, 95 Cal. 317; 29 Am. St. Rep. 115; 30 Pac. 545; Russell v. Abstract Co., 87 Ia. 233; 43 Am. St. Rep. 381; 54 N. W. 212; State v. Standard Oil Co., 49 O. S. 137; 34 Am. St. Rep. 541; 30 N. E. 279; Ramsey v. Quillen, 5 Lea (Tenn.) 184.

⁴ Home Life Ins. Co. v. Elwell, 111 Mich. 689; 70 N. W. 334.

⁵ Voight v. Raby, 90 Va. 799; 20 S. E. 824.

⁶ McIver v. Ragan, 2 Wheat. (U. S.) 25.

⁷ Kendall v. United States, 107 U. S. 123.

⁸ *In re Griffith*, 35 Kan. 377; 11 Pac. 174.

⁹ Amy v. Watertown, 130 U. S. 320; Engel v. Fischer, 102 N. Y. 400; 55 Am. Rep. 818; 7 N. E. 300.

¹⁰ Mereness v. Bank, 112 Ia. 11; 84 Am. St. Rep. 318; 51 L. R. A. 410; 83 N. W. 711.

¹¹ Keyser's Appeal, 124 Pa. St. 80; 2 L. R. A. 159.

¹² Mereness v. Bank, 112 Ia. 11; 84 Am. St. Rep. 318; 51 L. R. A. 410; 83 N. W. 711.

tion whereby the debt is incurred, does not prevent limitations from running against such debt. Thus an attorney compromised a suit for his client, collected money as a result of such compromise, and kept it. The client refused to ratify the compromise and brought suit to have it set aside; but failed to do so. Such conduct on the part of the client was held not to prevent limitations from running in favor of the attorney.¹³ These statutory exceptions, furthermore, are exceptions to the statute; but they are not exceptions to contractual provisions limiting the time within which either party may sue the other upon such contract, if such provisions do not refer to such exceptions.¹⁴

§1661. *Invincible necessity.*

There is one important class of exceptions to the general rule that exceptions to the statute of limitations must of themselves be statutory. This class of exceptions is said by some courts to be those arising out of "invincible necessity,"¹ an expression which, though suggestive, is not exact enough to serve as a definite rule. Included within this principle are cases where it is impossible to sue, not on account of any personal disqualification or disability of either party, but because the action of the state in some way has prevented or delayed the institution and progress of litigation. If in some way the paramount authority of the state forbids a suit to be brought, limitations does not run against the plaintiff until such prohibition ceases, and it becomes possible once more to maintain

¹³ *Schofield v. Woolley*, 98 Ga. 548; 58 Am. St. Rep. 315; 25 S. E. 769.

¹⁴ *Riddlesbarger v. Ins. Co.*, 7 Wall. (U. S.) 386; *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 462; 34 Am. Rep. 550; *Wilkinson v. First Nat. F. Ins. Co.*, 72 N. Y. 499; 28 Am. Rep. 166; *Hocking v. Howard Ins. Co.*, 130 Pa. 170; 18 Atl. 614; *National Ins. Co. v. Brown*, 128 Pa. 386; 18 Atl. 389; *Farmers' Mut. F. Ins. Co. v. Barr*, 94 Pa. 345; *Brown v. Hartford Ins.*

Co., 7 R. I. 301; *Guthrie v. Indemnity Association*, 101 Tenn. 643; 49 S. W. 829..

¹ Thus inability of the creditor to sue "happening by an invincible necessity constitutes an exception from the statute of limitations and is to be taken to have the same effect as those disabilities which are expressly excepted from the statute." *Hill v. Phillips*, 14 R. I. 93.

the action.² So under a statute which prevents suit from being brought against the executor or administrator upon any liability of the decedent for a certain period after the appointment of such executor or administrator, such period of time is usually not counted in determining whether limitations has run.³ If the state has abolished the charter of a city, and has not granted a new one for some time thereafter, limitations does not run against a cause of action against the city during such period.⁴ If a state of war exists in the jurisdiction where the action would have to be brought, and the civil courts are thereby suspended, such period of time cannot be counted in determining whether limitations have run.⁵ This rule applies to claims of private citizens⁶ and to claims of the United States.⁷ So if for any other reason the state furnishes no court of appropriate jurisdiction for determining the validity of the claim in question, limitations does not run until such court is furnished. So if a suit to recover a tax once paid can be maintained only after an appeal to the Commissioner of Internal Revenue, the time necessary for such appeal cannot be counted in determining whether limitations has run.⁸ If the plaintiff is prevented by an injunction issued at the instance of the defendant from prosecuting his cause of action, the time during which the plaintiff was so enjoined cannot be counted in determining whether limitations has run.⁹ So if the institution of proceedings in bankruptcy prevents the prosecution of claims against the bankrupt, the time during which such prosecution is so prevented is not counted in determining whether limitations has run.¹⁰

² *Braun v. Sauerwein*, 10 Wall. (U. S.) 218.

³ *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97; 10 So. 80; *Blaskower v. Steel*, 23 Or. 106; 31 Pac. 253.

⁴ *Broadfoot v. Fayetteville*, 124 N. C. 478; 70 Am. St. Rep. 610; 32 S. E. 804.

⁵ *The Protector*, 9 Wall. (U. S.) 687; *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *Selden v. Preston*, 11 Bush. (Ky.) 191; *Yancy v. Yancy*,

Heisk. (Tenn.) 353; 13 Am. Rep. 5.

⁶ *The Protector*, 9 Wall. (U. S.) 687; *Hanger v. Abbott*, 6 Wall. (U. S.) 532.

⁷ *United States v. Wiley*, 11 Wall. (U. S.) 508.

⁸ *Braun v. Sauerwein*, 10 Wall. (U. S.) 218.

⁹ *North British, etc., Ins. Co. v. Lathrop*, 70 Fed. 429; *Rose v. Foord*, 96 Cal. 152; 30 Pac. 1114.

§1662. Disability of plaintiff.— Infancy and insanity.

The exact language of the exceptions to the statute of limitations created by the statute itself, depends of course upon the wording of the particular statute laying down such rule of limitations and the exception thereto. No exact statement therefore can be made of the general effect of all statutes, and a specific discussion of the separate statutes of each state would not fall within the scope of this work. The general principles, however, underlying the most of the state statutes, are substantially alike; and those general principles will be discussed here. The statutory exceptions to the statute of limitations may be roughly grouped under two headings: (1) Those arising by reason of some specific disability of the plaintiff; and, (2) those arising out of specific conduct of the defendant. The common classes of disability of the plaintiff enumerated in the statute are here discussed. It must be noticed, however, that if the statute omits one of these classes, the court cannot, for reasons already given, supply such omissions, no matter how unreasonable to have omitted such exception.¹ If the plaintiff is an infant when the cause of action accrues, the statutes generally provide either that limitation shall not run during his minority, or that after he reaches full age, a certain time shall be given to him within which to maintain an action.² Where such exception is made, the fact that the minor has a guardian who could maintain the action on behalf of the minor, does not make limitations run against the infant.³ So limitations has been held not to run against a trustee where the beneficiary is a minor.⁴ If the plaintiff is insane when the cause of action accrues, the statutes generally provide, either that limitations does not run until he regains sanity,

¹⁰ Hall v. Greenbaum, 33 Fed. 22; Parker v. Sanborn, 7 Gray (Mass.) 191.

¹ See § 1660.

² Falls v. Wright, 55 Ark. 562; 29 Am. St. Rep. 74; 18 S. W. 1044; Lambert v. Billheimer, 125 Ind. 519; 25 N. E. 451; Myers v. Korb (Ky.), 50 S. W. 1108; Smith v.

Felter, 61 N. J. L. 102; 38 Atl. 746; Darrow v. Calkins, 154 N. Y. 503; 61 Am. St. Rep. 637; 49 N. E. 61; Carroll v. Montgomery, 128 N. C. 278; 38 S. E. 874.

³ Grimsby v. Hudnell, 76 Ga. 378; 2 Am. St. Rep. 46.

⁴ Ward v. Ward, 12 Ohio C. D.

59.

or that after he regains sanity certain additional time shall be allowed him within which to maintain his action.⁵ It is not necessary that there be an adjudication of insanity in order to bring the plaintiff within this exception.⁶ This statutory exception exists even if a guardian has been appointed for the insane person by whom such action could be maintained.

§1663. Coverture.

When the Common Law theory of the relation between husband and wife, and the effect of marriage upon the status of the wife existed, the statutes generally contained a specific provision that limitations should not run against a married woman.¹ Under the modern theory of the relation between the husband and wife, and the power of a married woman, a question has arisen as to the propriety of the former statutory exception of a married woman from the operation of the statutes of limitation. Of course as long as no modification of any sort has been made by statute, the courts have no power to repeal the statutory exception on the ground that they think it no longer wise or necessary. On the other hand, if the statutes of limitation is amended, and the class of married women is specifically omitted from the list of statutory exceptions, there can be no question that limitations runs against her.² The question presenting difficulty arises where the statute of limitations is not itself amended, but married women's acts had been passed, giving her full control over her property, and providing that she can sue and be sued as if she was unmarried. In such cases the weight of authority holds that the married woman's act operates as an implied modification of the statute of limitations.³ Some authorities, however,

⁵ *Lantis v. Davidson*, 60 Kan. 389; 56 Pac. 745; *Kelley v. Gallup*, 67 Minn. 169; 69 N. W. 812.

⁶ *Lantis v. Davidson*, 60 Kan. 389; 56 Pac. 745.

¹ *Wright v. Tichenor*, 104 Ind. 185; 3 N. E. 853; *Johnson v. Edwards*, 109 N. C. 466; 26 Am. St. Rep. 580; *Harris v. Smith*, 98 Tenn. 286; 39 S. W. 343.

² *Clark v. Gibbons*, 83 N. Y. 107.

³ *Cameron v. Smith*, 50 Cal. 303; *Castner v. Walrod*, 83 Ill. 171; 25 Am. Rep. 369; *Curbay v. Bellemer*, 70 Mich. 106; 37 N. W. 911; *Murphy v. Laundry Co.*, 52 Neb. 593; 72 N. W. 960.

hold that the married woman's act does not affect the statute of limitations, and that the married woman is still exempt from the general operation of the statute of limitations.⁴ Most of the cases last cited, however, were under statutes giving the married woman power to sue but not removing her disabilities generally. Thus a married woman who is registered as a free-trader and has thus by statute the power of contracting as a *feme sole* is still protected by the statutes of limitation.⁵ At Common Law neither husband nor wife could maintain an action against the other. Accordingly, if the adversary parties to a contract intermarry, the right to maintain an action on such contract is suspended by the paramount authority of the law, and limitations does not run.⁶ Where a cause of action can exist in favor of a wife against her husband limitations does not run during coverture,⁷ but begins to run at the death of the husband.⁸

§1664. Imprisonment of plaintiff.

If the plaintiff is imprisoned when the cause of action accrues in his favor, it is provided in most statutes that limitations shall not run against him during such imprisonment.¹

§1665. Absence of plaintiff.

Some of the earlier statutes provided that if when the cause of action accrued in his favor the plaintiff was beyond the seas, an expression which in the United States has been held to mean without the limits of the state,¹ the statutes of limita-

⁴ Rowland v. McGuire, 64 Ark. 412; 42 S. W. 1068; Lindell Real Estate Co. v. Lindell, 142 Mo. 61; 43 S. W. 368; Campbell v. Crater, 95 N. C. 156; Ashley v. Rockwell, 43 O. S. 386; 2 N. E. 437.

⁵ Wilkes v. Allen, 131 N. C. 279; 42 S. E. 616.

⁶ Parrett v. Palmer, 8 Ind. App. 356; 52 Am. St. Rep. 479; 35 N. E. 713; Fawcett v. Fawcett, 85 Wis. 332; 39 Am. St. Rep. 844; 55 N.

W. 405; Second National Bank v. Merrill, 81 Wis. 151; 29 Am. St. Rep. 877; 50 N. W. 505.

⁷ Gudden v. Gudden's Estate, 113 Wis. 297; 89 N. W. 111.

⁸ Gracie's Estate, 158 Pa. St. 521; 27 Atl. 1083.

¹ Downs v. Allen, 10 Lea (Tenn.) 652.

¹ Bank of Alexandria v. Dyer, 14 Pet. (U. S.) 141 (under Maryland law); Davie v. Briggs, 97 U. S.

tions do not run against him until his return. This exception has been repealed in many of the modern statutes, and on its repeal such absence of the plaintiff does not prevent limitations from running.

§1666. Disability of plaintiff must exist when cause of action accrues.

The disabilities of the plaintiff enumerated by statute must, in the absence of specific statutory provision, exist when the cause of action accrues. If when the cause of action accrues the plaintiff is competent to maintain the action, and subsequently, while the period of limitations is still running, he becomes subject to one of the disabilities enumerated in the statute, such disability does not prevent the statute of limitations from continuing to run against him.¹ If a cause of action accrues in favor of an adult, his death does not stop limitations from running even though the persons who succeed him in interest are minors.² This rule has been applied where the right to bring a proceeding in error accrued to an adult and before the time limited had expired he died and his interests descended to minors.³ So if the creditor is sane when the cause of action accrues his subsequent insanity does not prevent limitations from running.⁴ Furthermore, all the dis-

628. In *Earle v. Dickson*, 1 Dev. L. (N. C.) 16, the expression "beyond the seas" was construed literally; the court holding that the legislature referred to British creditors.

¹ *McDonald v. Hovey*, 110 U. S. 619; *McLeran v. Benton*, 73 Cal. 329; 2 Am. St. Rep. 814; 14 Pac. 879; *Beattie v. Whipple*, 154 Ill. 273; 40 N. E. 340; *Black v. Ross*, 110 Ia. 112; 81 N. W. 229; *Daniells v. Daniells*, 92 Mich. 208; 52 N. W. 303; *Kelley v. Gallup*, 67 Minn. 169; 69 N. W. 812; *Jones v. Lemon*, 26 W. Va. 629; *Swearingen v. Robertson*, 39 Wis. 462; *Bliler v. Boswell*, 9 Wyom. 57; 59 Pac. 798; 61 Pac. 867.

² *Gibson v. Herriott*, 55 Ark. 85; 29 Am. St. Rep. 17; 17 S. W. 589; *Castro v. Geil*, 110 Cal. 292; 52 Am. St. Rep. 84; 42 Pac. 804; *McLeran v. Benton*, 73 Cal. 329; 2 Am. St. Rep. 814; 14 Pac. 879; *Grether v. Clark*, 75 Ia. 383; 9 Am. St. Rep. 491; 39 N. W. 655; *Pim v. St. Louis*, 122 Mo. 654; 27 S. W. 525; *Hardy v. Riddle*, 24 Neb. 670; 39 N. W. 841.

³ *Hinde v. Whitney*, 31 O. S. 53.

⁴ *Grady v. Wilson*, 115 N. C. 344; 44 Am. St. Rep. 461; 20 S. E. 518. And see for similar facts *Oliver v. Pullam*, 24 Fed. 127.

abilities which can be used to prevent the running of the statute of limitations must exist when the cause of action accrues. Hence, if the plaintiff suffers under one disability, when the cause of action accrues, and before such disability ceases, he becomes subject to another disability, the statute of limitations begins to run from the date of the cessation of the first disability, and continues to run even though the plaintiff may during the whole time be under some form of disability. The attempt to prevent the statute of limitations from running by adding the successive disabilities, is what is known as "tacking disabilities," and is forbidden.⁵ Thus if, when a right of action in ejectment accrues, plaintiff is a minor, and she subsequently marries before coming of age, her coverture does not prevent limitations from running against her when she comes of age.⁶ So if a woman is a *feme covert* when the cause of action accrues, and subsequently her husband dies and she then remarries, limitations continues to run notwithstanding her second marriage.⁷ If a cause of action in favor of a person under a disability passes either by operation of law or by act of the parties to a person also under a disability, the periods covered by the two disabilities cannot be added.⁸ Thus in an ejectment suit if the claimant living when the right of action accrues is a *feme covert* and she sub-

⁵ McDonald v. Hovey, 110 U. S. 619; Doyle v. Wade, 23 Fla. 90; 11 Am. St. Rep. 334; 1 So. 516; Hibernian Banking Association v. Bank, 157 Ill. 524; 41 N. E. 919; Manion v. Titsworth, 18 B. Mon. (Ky.) 582; Clark v. Jones, 16 B. Mon. (Ky.) 121; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129; 8 Am. Dec. 467; Patton v. Dixon, 105 Tenn. 97; 58 S. W. 299; White v. Latimer, 12 Tex. 61; McFarland v. Stone, 17 Vt. 165; 44 Am. Dec. 325. "Disabilities which bring a person within the exceptions of the statute cannot be piled one upon another; but a party claiming the benefit of the proviso can only avail himself

of the disability existing when the right of action first accrued." Syllabus in Mercer v. Selden, 1 How. (U. S.) 37; quoted in Cozzens v. Farnan, 30 O. S. 491, 497; 27 Am. Rep. 470.

⁶ Cozzens v. Farnan, 30 O. S. 491; 27 Am. Rep. 470. For similar facts see Sims v. Gay, 109 Ind. 501; Downing v. Ford, 9 Dana (Ky.) 391; Eager v. Commonwealth, 4 Mass. 182; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129; 8 Am. Dec. 467.

⁷ Mitchell v. Berry, 1 Met. (Ky.) 602.

⁸ Whitney v. Webb, 10 Ohio 513.

sequently dies and her interests descend to a minor heir, the periods covered by these two disabilities cannot be added;⁹ and so if the ancestor was insane when the cause of action accrues and on his death his interest descends to minor heirs.¹⁰ So if a party to the contract is under no disability when the cause of action accrues his subsequent assignment of the contract to an assignee who is under disability does not prevent the statute from operating.¹¹ If, however, the plaintiff suffered under several disabilities at the time when his cause of action accrued, limitations does not begin to run against him until the last of the disabilities from which he was then suffering has ceased to operate.¹²

§1667. Death of party.

The death of a party after a right of action has once accrued,¹ whether plaintiff² or defendant,³ does not suspend the running of the statute of limitations. In case the plaintiff dies, it is the duty of those claiming under him to proceed at once to have an executor or administrator appointed to collect claims due to his estate, and accordingly it is their own fault if there is no party in existence capable of bringing suit.⁴ So if the defendant dies, persons having claims against his estate have it in their power in most states to have an administrator appointed against whom such claims can be presented, and their failure to cause such appointment to be made, is caused by their own negligence. Hence failure to appoint a personal representative does not extend the period of limitations in

⁹ Davis v. Coblens, 174 U. S. 719. And for similar facts see Patton v. Dixon, 105 Tenn. 97; 58 S. W. 299.

¹⁰ Thorp v. Raymond, 16 How. (U. S.) 247.

¹¹ Meyer v. Christopher, 176 Mo. 580; 75 S. W. 750; Causey v. Snow, 122 N. C. 326; 29 S. E. 359.

¹² Sims v. Everhardt, 102 U. S. 300; Sims v. Bardoner, 86 Ind. 87; 44 Am. Rep. 263.

¹ Davis v. Hart, 123 Cal. 384; 55 Pac. 1060; Hardy v. Riddle, 24 Neb.

670; 39 N. W. 841; Granger v. Granger, 6 Ohio 35; Rowan v. Chenoweth, 49 W. Va. 287; 87 Am. St. Rep. 796; 38 S. E. 544.

² Mereness v. Bank, 112 Ia. 11; 84 Am. St. Rep. 318; 83 N. W. 711; Hill v. Townley, 45 Minn. 167; 47 N. W. 653.

³ McMillan v. Hayward, 94 Cal. 357; 29 Pac. 774.

⁴ Rowan v. Chenoweth, 49 W. Va. 287; 87 Am. St. Rep. 796; 38 S. E. 544.

either case. So the death of a party to a suit eighteen days before the time fixed for taking an appeal expired, does not extend the time for taking such appeal though an administrator was not appointed for six months thereafter.⁵ If a cause of action accrues in favor of a decedent's estate after his death, it has been held that limitations does not begin to run until an administrator has been appointed.⁶ Thus insurance which should have been paid to the administrator of decedent was paid to another. Limitations was held not to run against the right to recover such money from such other person until an administrator was appointed.⁷ Even where leave of court is necessary to enable an action to be brought, omission to ask such leave does not prevent limitations from running from the time when such leave might have been asked, and if it had been obtained, suit might have been brought.⁸ Thus even if leave of court to bring an action is necessary, limitations runs on a judgment from its rendition,⁹ and on an administrator's bond from the date of the final decree of distribution.¹⁰ By statute in some jurisdictions the statute of limitations is suspended on the death of the debtor, either for a fixed period of time,¹¹ or till an administrator is appointed.¹²

§1668. Conduct of defendant.—Absence from state.

The conduct of the defendant, which is generally selected by statute as that which prevents limitations from running in

⁵ Williams v. Long, 130 Cal. 58; 80 Am. St. Rep. 68; 62 Pac. 264.

⁶ St. Paul Trust Co. v. Sargent, 44 Minn. 449; 47 N. W. 51; Riner v. Riner, 166 Pa. St. 617; 45 Am. St. Rep. 693; 31 Atl. 347. *Contra*, *Hibernia Savings, etc., Society v. Conlin*, 67 Cal. 178; 7 Pac. 477.

⁷ Riner v. Riner, 166 Pa. St. 617; 45 Am. St. Rep. 693; 31 Atl. 347.

⁸ Gauser v. Gauser, 83 Minn. 199; 85 Am. St. Rep. 461; 86 N. W. 18; *Osborne v. Lindstrom*, 9 N. D. 1; 81 Am. St. Rep. 516; 46 L. R. A. 715; 81 N. W. 72; *Spokane v. Prescott*, 19 Wash. 418; 67 Am. St. Rep. 733; 53 Pac. 661.

⁹ *Osborne v. Lindstrom*, 9 N. D. 1; 81 Am. St. Rep. 516; 46 L. R. A. 715; 81 N. W. 72.

¹⁰ *Gausser v. Gausser*, 83 Minn. 199; 85 Am. St. Rep. 461; 86 N. W. 18.

¹¹ *Casey v. Gibbons*, 136 Cal. 368; 68 Pac. 1032; *Willis v. Sutton*, 116 Ga. 283; 42 S. E. 526; *Groesbeck v. Crow*, 91 Tex. 74; 40 S. W. 1028.

¹² *Farris v. Haskins* (Ky.), 63 S. W. 577; *Whiteside v. Catching*, 19 Mont. 394; 48 Pac. 747.

his favor is his absence from the state. If he is absent from the state at the time when the cause of action accrues against him, the statute of limitations does not begin running in his favor until his return to the state.¹ The statute which provides for the absence of the defendant from the state, usually provides that the time during which he is absent from the state shall not be counted in determining whether limitations has run or not. Under such statutes if the defendant is within the state when the cause of action accrues, and subsequently removes from the state, the time during which he is absent from the state must be deducted from the entire period for the purpose of determining whether limitations has run or not.² Under some statutes the absence and return of the debtor makes a new point of time from which limitations is to run.³ Absence from the state includes cases where the defendant resides elsewhere when the cause of action accrues and moves into the state at a later time. Limitations runs in such cases from the time that he moves into the state.⁴ So if he has never been a resident of the state at the time that the cause of action against him accrues, limitations does not run in his favor until he moves into the state.⁵ A note was given in New Hampshire. After it fell due, but before it was there barred by limitations, the maker moved to South Carolina.

¹ *Stone v. Hammel*, 83 Cal. 547; 17 Am. St. Rep. 272; 8 L. R. A. 425; 23 Pac. 703; *Wood v. Bissell*, 108 Ind. 229; 9 N. E. 425.

² *Williams v. Loan Association*, 131 N. C. 267; 42 S. E. 607; *Stanley v. Stanley*, 47 O. S. 225; 21 Am. St. Rep. 806; 8 L. R. A. 333; 24 N. E. 493; *Wilson v. Daggett*, 88 Tex. 375; 53 Am. St. Rep. 766; 31 S. W. 618; *Bignold v. Carr*, 24 Wash. 413; 64 Pac. 519.

³ *Cottrell v. Kenney*, 25 R. I. 99; 54 Atl. 1010.

⁴ *Steen v. Swadley*, 126 Ala. 616; 28 So. 620; *Wetmore v. Marsh*, 81 Ia. 677; 47 N. W. 1021; *Broadway National Bank v. Baker*, 176 Mass.

294; 57 N. E. 603; *Freundt v. Hahn*, 24 Wash. 8; 85 Am. St. Rep. 939; 63 Pac. 1107; *Adkins v. Loucks*, 107 Wis. 587; 83 N. W. 934.

⁵ *Mason v. Mfg. Co.*, 81 Md. 446; 48 Am. St. Rep. 524; 29 L. R. A. 273; 32 Atl. 311; *Jordan v. Seacombe*, 33 Minn. 220; 22 N. W. 383; *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263; 3 Am. Dec. 482; *Burrows v. French*, 34 S. C. 165; 27 Am. St. Rep. 811; 13 S. E. 355; *McConnell v. Spicker*, 15 S. D. 98; 87 N. W. 574; *Kempe v. Bader*, 86 Tenn. 189; 6 S. W. 126; *overruling Barbour v. Erwin*, 14 Lea (Tenn.) 716.

Suit was there brought against him after the statutory period fixed by the South Carolina statute counting from the maturity of the note, but within the period counting from the time that the maker came to South Carolina. It was held that under a section of the statute which prevents limitations from running against a maker who is out of the state when the cause of action accrues until his return, the action was brought in time.⁶ So a statute providing that limitations shall not begin to run if the defendant is "absent from the state when the cause accrues," applies to an action against a foreign corporation, although the cause of action arose in another state.⁷ Some courts take a different view and hold that the statute as to absence from the state does not apply to one once a citizen who removes from the state before the "accrual or birth of the cause of action."⁸ In these states there is some conflict of authority as to whether one who is a resident of the state at the time of the "birth" of the cause of action, but who removes before the maturity of the cause of action is within the exception of the statute.⁹ The fact that the defendant makes "casual temporary visits" to the state,¹⁰ or that he returns to the state as a traveling salesman, being in the state several months during each year, but not staying at any one place more than a day or so,¹¹ does not make limitations run in his favor. Within the meaning of a statute which provides that if the defendant shall "depart from and reside outside of the state," limitations shall not run against him, a change of residence is necessary.¹² Accordingly, if a congressman liv-

⁶ *Burrows v. French*, 34 S. C. 165; 27 Am. St. Rep. 811; 13 S. E. 355. See to the same effect, *McConnell v. Spicker*, 15 S. D. 98; 87 N. W. 574.

⁷ *Mason v. Mfg. Co.*, 81 Md. 446; 48 Am. St. Rep. 524; 29 L. R. A. 273; 32 Atl. 311.

⁸ *Fisher v. Hartley*, 48 W. Va. 339; 86 Am. St. Rep. 39; 54 L. R. A. 215; 37 S. E. 578. So *Walsh v. Schilling*, 33 W. Va. 108; 10 S. E. 54.

⁹ That he is within the exception.

Hefflebower v. Detrick, 27 W. Va. 16.

¹⁰ *Connecticut, etc., Co. v. Wead*, 172 N. Y. 497; 92 Am. St. Rep. 756; 65 N. E. 261.

¹¹ *Weille v. Levy*, 74 Miss. 34; 60 Am. St. Rep. 500; 20 So. 3.

¹² *Barney v. Oelrichs*, 138 U. S. 529; *Pells v. Snell*, 130 Ill. 379; 23 N. E. 117; reversing 31 Ill. App. 158; *Slocum v. Riley*, 145 Mass. 370; 14 N. E. 174; *Marx v. Kilpatrick*, 25 Neb. 107; 41 N. W. 111; *Farr v. Durant*, 90 Wis. 341; 63 N. W. 274.

ing within the state goes to Washington with his family, but leaves his house in charge of his servants, he is not residing outside of the state so as to interrupt the running of the statute of limitations in his favor.¹³ A claim against one of two or more joint debtors is barred by limitations if such joint debtor is a resident, though one of the other joint debtors was absent from the state.¹⁴ A claim against a partnership is not relieved from the operation of the statute by the absence of one partner, the other being a resident.¹⁵ A claim against a surety, on which an action can be brought in the absence of the principal debtor, is barred by limitations if the surety is a resident though the principal debtor is without the state.¹⁶ A claim against the principal debtor was barred by limitations. A surety of the principal debtor who had been absent from the state and in whose favor limitations had not run, gave his note on his return to a co-surety for his share of the total amount of the principal's debt paid by such co-surety. This was held not to give to such surety any cause of action against the principal debtor.¹⁷ The statutory provision, that time during which a defendant is absent from the state shall not be counted in determining whether the period of limitations has elapsed, applies to cases where a non-resident has property within the state, which might be taken in some proceeding *in rem*.¹⁸ Hence in actions to foreclose a mortgage,¹⁹ or other actions affecting real estate,²⁰ limitations does

¹³ Kerwin v. Sabin, 50 Minn. 320; 36 Am. St. Rep. 645; 17 L. R. A. 225; 52 N. W. 642. *Contra*, Lane v. Bank, 6 Kan. 74.

¹⁴ Mozingo v. Ross, 150 Ind. 688; 65 Am. St. Rep. 387; 41 L. R. A. 612; 50 N. E. 867; Denny v. Smith, 18 N. Y. 567 (overruling Brown v. Delafield, 1 Den. (N. Y.) 445).

¹⁵ Lovett's Administrator v. Perry, 98 Va. 604; 37 S. E. 33.

¹⁶ Mozingo v. Ross, 150 Ind. 688; 65 Am. St. Rep. 387; 41 L. R. A. 612; 50 N. E. 867; Davis v. Clark, 58 Kan. 454; 49 Pac. 665.

¹⁷ Stone v. Hammel, 83 Cal. 547;

17 Am. St. Rep. 272; 8 L. R. A. 425; 23 Pac. 703.

¹⁸ Grist v. Williams, 111 N. C. 53; 32 Am. St. Rep. 782; 15 S. E. 889. *Contra*, Zoll v. Carnahan, 83 Mo. 35; Anderson v. Baxter, 4 Or. 105.

¹⁹ Hibernian Banking Association v. Bank, 157 Ill. 524; 41 N. E. 919; Brown v. Rockhold, 49 Ia. 282; Kulp v. Kulp, 51 Kan. 341; 21 L. R. A. 550; 32 Pac. 1118.

²⁰ Applegate v. Applegate, 107 Ia. 312; 78 N. W. 34; Newlove v. Pennock, 123 Mich. 260; 82 N. W. 54.

not run during the absence of the defendant from the state, even though service by publication might be obtained. The creditor has a right to personal service and a personal judgment. Furthermore, whatever it may have been wise for the legislature to enact, the courts have no power, under a statute which provides that limitations shall not run during the absence of defendant from the state, to create thereto the exception of cases where some relief might have been had on constructive service. An exception to this rule is generally recognized in cases where the right of action is exclusively *in rem*, and personal service upon the non-resident could have no effect upon the progress of the litigation. So the absence of a mortgagor who has conveyed to a resident grantee is held not to stop limitations as to the mortgage.²¹ So the absence of a grantee of mortgaged realty who is not personally liable for the mortgage debt has been held not to stop limitations.²² On the other hand, if the mortgagor is personally liable for the debt and has conveyed to a resident by an unrecorded deed of which the mortgagee has no notice, his absence stops limitations from running.²³ In some states by express provision of the statute, limitations runs as to actions *in rem*, even if the defendant is absent.²⁴ Thus the absence of an adverse possessor who leaves a tenant or agent in possession does not prevent limitations from running in his favor.²⁵ So under such statute limitations runs against foreclosure even if the mortgagor is absent.²⁶ So under other statutes limitations runs if defendant left in the state property subject to attachment sufficient to satisfy plaintiff's claims and plaintiff knew of such fact.²⁷ The clause of the statute providing that time during which a party is absent from the state after a cause

²¹ *Filippini v. Trobock*, 134 Cal. 441; 66 Pac. 587; reversing, 62 Pac. 1066. etc., R. R., 45 Minn. 387; 48 N. W. 17.

²² *Hogaboom v. Flower*, 67 Kan. 41; 72 Pac. 547. ²⁵ *Omaha, etc., Co. v. Parker*, 33 Neb. 775; 29 Am. St. Rep. 506; 51 N. W. 139.

²³ *Denny v. Palmer*, 26 Wash. 469; 90 Am. St. Rep. 766; 67 Pac. 268. ²⁶ *Hurley v. Cox*, 9 Neb. 230; 2 N. W. 705.

²⁷ *Little v. Blunt*, 16 Pick. (Mass.) 359.

²⁴ *City of St. Paul v. Chicago*, (Mass.) 359.

of action accrues against him, shall not be taken as any part of the time limited applies where the maker and payee, who were husband and wife, left the state together and resided in another state for a considerable period of time, and then returned to the state where the note in question was originally given.²⁸

§1669. Fraudulent concealment by defendant.

Cases not infrequently arise where the cause of action was created by the fraud of the defendant, and fraud consists of such concealment of the truth that the plaintiff did not at the time of the transaction know of his injury or of the fact that a cause of action existed in his favor. The question has been presented, whether as long as such fraud could not be discovered by due diligence on the part of the injured person, the statute of limitations should run against him. A like question has been presented where the original cause of action was not based upon the fraud of the defendant, but where the defendant has been guilty of some active concealment whereby the injured party has been prevented from discovering the existence of the cause of action in his favor. Where equity is not bound by the statute of limitations, but acts only in analogy thereto, the courts of equity hold that fraud or concealment of the kinds herein named, prevents the statute of limitations from running.¹ In courts of law the original rule was that in analogy to the rule concerning the personal disability of the plaintiff, they were unable to create by judicial legislation exceptions which had not been made by the legislature, and hence such facts could not prevent the statute of limitations

²⁸ Blackburn v. Blackburn, 124 Mich. 190; 83 Am. St. Rep. 325; 82 N. W. 835.

¹ Jones v. Van Doren, 130 U. S. 684; Kirby v. Ry., 120 U. S. 130; Bailey v. Glover, 21 Wall. (U. S.) 342; Veazie v. Williams, 8 How. (U. S.) 134, 158; Prevost v. Gratz, 6 Wheat. (U. S.) 481; Odell v. Moss,

130 Cal. 352; 62 Pac. 555; Lieberman v. Bank, 2 Penne. (Del.) 416; 45 Atl. 901; Wilder v. Secor, 72 Ia. 161; 2 Am. St. Rep. 236; 33 N. W. 448; Longworth v. Hunt, 11 O. S. 194; Semple v. Callery, 184 Pa. St. 95; 39 Atl. 6; Maldaner v. Beurhaus, 108 Wis. 25; 84 N. W. 25.

from running.² In some courts of law, however, it has been held that limitations should not begin to run until the cause of action, which has been fraudulently concealed by the defendant, has been discovered.³ In many jurisdictions, however, the question is put at rest by statutes which to a greater or less extent adopt the equity rule as applicable to cases at law.⁴ Under such statutes limitations runs at least when the cause of action is discovered and perfected.⁵ If diligence is used limitations does not run until the cause of action is discovered.⁶ This rule is of course modified in some states by specific statutory provisions fixing a time within which a cause of action is barred, whether the fraud is discovered or not. If due diligence is not used limitations runs from the time when the cause of action could have been discovered had such diligence been used.⁷ Concealment which will suspend the running of the statute must ordinarily be concealment by the defendant who is seeking to interpose the bar of the statute; or by some one authorized by him; or he must know of the deceit practised upon the plaintiff. If the plaintiff is deceived

² *Ellis v. Kelso*, 18 B. Mon. (Ky.) 296; *Troup v. Smith*, 20 Johns. (N. Y.) 33; *Fee's Administrator v. Fee*, 10 Ohio 469; 36 Am. Dec. 103; *Miles v. Berry*, 1 Hill (S. C.) 296; *York v. Bright*, 4 Humph. (Tenn.) 312; *Cook v. Darby*, 4 Munf. (Va.) 444.

³ *Penobscot Ry. Co. v. Mayo*, 67 Me. 470; 24 Am. Rep. 45; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Munson v. Hallowell*, 26 Tex. 475; 84 Am. Dec. 582. See obiter in *Bree v. Halbech*, 2 Dougl. 654a, and *Bailey v. Glover*, 21 Wall. (U. S.) 342, on which many of the cases taking this view have been based.

⁴ *Bromberg v. Sands*, 127 Ala. 411; 30 So. 510; *Faust v. Hosford*, 119 Ia. 97; 93 N. W. 58; *Bement v. Ohio Valley Banking & Trust Co.*, 99 Ky. 109; 59 Am. St. Rep. 445; 35 S. W. 139; *Alpha Mills v. En-*

gine Co., 116 N. C. 797; 21 S. E. 917; *Larsen v. Trust Co.*, 23 Utah 449; 65 Pac. 208; *Stearns v. Hochbrunn*, 24 Wash. 206; 64 Pac. 165.

⁵ *Bromberg v. Sands*, 127 Ala. 411; 30 So. 510.

⁶ *Faust v. Hosford*, 119 Ia. 97; 93 N. W. 58; *Cole v. Bank*, 114 Ia. 632; 87 N. W. 671; *Forsyth v. Easterday*, 63 Neb. 887; 89 N. W. 407; *Larsen v. Trust Co.*, 23 Utah 449; 65 Pac. 208; *Stearns v. Hochbrunn*, 24 Wash. 206; 64 Pac. 165.

⁷ *Wood v. Carpenter*, 101 U. S. 135; *Nicholson v. Tarpey*, 124 Cal. 442; 57 Pac. 457; *Maxwell v. Walsh*, 117 Ga. 467; 43 S. E. 704; *Mather v. Rogers*, 99 Ia. 292; 68 N. W. 700; *Clarke v. Seay* (Ky.), 51 S. W. 589; *Whaley v. Catlett*, 103 Tenn. 347; 53 S. W. 131; *Ludington v. Patton*, 111 Wis. 208; 86 N. W. 571.

by the fraud of a third person, limitations is not suspended as in favor of the defendant unless he authorized such wrongful conduct.⁸ However, fraudulent concealment by a principal debtor which prevents the cause of action from running against him, prevents it from running against his surety.⁹

§1670. Disabilities limited to party specified.

If the above disabilities are by statute made exceptions to the statute of limitations in cases where they are suffered by the plaintiff, the courts cannot by construction extend them to apply to cases where they are suffered by the defendant and not by the plaintiff.¹ Thus infancy,² insanity,³ or coverture⁴ of the defendant cannot affect the running of the statute of limitations if not provided for by statute.

§1671. Dismissal of action not on merits.

Statutes specially provide in effect in most jurisdictions that if an action is brought before limitations has expired, and is dismissed without a hearing on the merits and without the plaintiff's voluntary act, a new action may be brought within a specified time thereafter even if such time exceeds the period of limitations.¹ This rule applies where the complaint in the first suit does not state a cause of action,² or omits to state a jurisdictional fact which really exists,³ or if the first action is brought in the Federal courts and is dismissed for want of

⁸ *Bates v. Preble*, 151 U. S. 149; *Campbell v. Campbell*, 133 Cal. 33; 65 Pac. 134; *Gibson v. Henley*, 131 Cal. 6; 63 Pac. 61; *Wood v. Williams*, 142 Ill. 269; 34 Am. St. Rep. 79; 31 N. E. 681.

⁹ *Eising v. Andrews*, 66 Conn. 58; 50 Am. St. Rep. 75; 33 Atl. 585; *McMullen v. Loan Association*, 64 Kan. 298; 91 Am. St. Rep. 236; 56 L. R. A. 924; 67 Pac. 892.

¹ *Petetin v. His Creditors*, 51 La. Ann. 1660; 26 So. 471.

² *Petetin v. His Creditors*, 51 La. Ann. 1660; 26 So. 471.

³ *Grady v. Wilson*, 115 N. C. 344; 44 Am. St. Rep. 461; 20 S. E. 518.

⁴ *Hodges v. Darden*, 51 Miss. 199.

¹ *Myers v. First Presbyterian Church*, 11 Okla. 544; 69 Pac. 874.

² *Woodcock v. Bostic*, 128 N. C. 243; 38 S. E. 881.

³ *Smith v. McNeal*, 109 U. S. 426.

jurisdiction,⁴ or the original action was brought prematurely,⁵ or where the action is otherwise dismissed without the voluntary act of the plaintiff and without a hearing on the merits.⁶ The statute does not apply where the first action was dismissed voluntarily by the plaintiff,⁷ or by the court for want of prosecution,⁸ or on account of the negligence of the plaintiff.⁹ The statute does not prevent limitations from running if the cause of action,¹⁰ or the parties,¹¹ are different in the second cause from those in the first.

IV. COMMENCEMENT OF ACTION.

§1672. Commencement of action stops limitations.

Under the statutes of limitation as ordinarily worded, actions can be brought only within certain specified periods. From this phraseology, it follows that the statute of limitations ceases to run against a given cause of action when suit is brought thereon,¹ even if final judgment is not rendered for a considerable period of time thereafter.² If error or appeal is prosecuted from the judgment of the trial court, limitations does not run during the pendency of such proceedings in error or appeal if the plaintiff is unable during such time to enforce the judgment rendered by the trial court.³ If, however, he can pro-

⁴ *Tompkins v. Ins. Co.*, 53 W. Va. 479; 97 Am. St. Rep. 1006; 44 S. E. 439.

⁵ *Seaton v. Hixon*, 35 Kan. 663; 12 Pac. 22.

⁶ *Spear v. Curtis*, 40 Vt. 59.

⁷ *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334; 1 So. 516.

⁸ *Jones v. Swanson*, 3 Head. (Tenn.) 161.

⁹ *Wilhemi v. Ins. Co.*, 103 Ia. 532; 72 N. W. 685.

¹⁰ *McDonald v. Jackson*, 55 Ia. 37; 7 N. W. 408; *Hughes v. Brown*, 88 Tenn. 578; 8 L. R. A. 480; 13 S. W. 286.

¹¹ *Henderson v. Griffin*, 5 Pet. (U. S.) 151; *Doyle v. Wade*, 23 Fla.

90; 11 Am. St. Rep. 334; 1 So. 516; *Hughes v. Brown*, 88 Tenn. 578; 8 L. R. A. 480; 13 S. W. 286.

¹ *Chambers v. Loan Association*, 126 Ala. 296; 28 So. 636; *Service v. Bank*, 62 Kan. 857; 62 Pac. 670; *Bank v. Alter*, 61 Neb. 359; 85 N. W. 300; *Forman v. Brewer*, 62 N. J. Eq. 748; 90 Am. St. Rep. 475; 48 Atl. 1012; *Hayton v. Beason*, 31 Wash. 317; 71 Pac. 1018.

² *Forman v. Brewer*, 62 N. J. Eq. 748; 90 Am. St. Rep. 475; 48 Atl. 1012.

³ *Nevitt v. Woodburn*, 160 Ill. 203; 52 Am. St. Rep. 315; 43 N. E. 385.

ceed unless a supersedeas bond is given limitations runs during an appeal if such bond is not given.⁴ The general rule that pendency of an action prevents limitations from running, may, of course, be modified by statute. Thus under a statute providing that if execution is not issued for one year on a judgment secured by the obligee on such bond, such judgment debtors as were sureties shall be released, bringing a suit "for discovery to enforce" such bond, is not a substitute for issuing execution and does not prevent limitations from running.⁵ In applying the general principle that bringing suit stops the running of the statute of limitations the question generally presented, and under a variety of forms, is at what time a suit can be properly said, within the meaning of this rule, to be commenced. This is, of course, primarily a question of procedure and as such is not for discussion here. Some illustrative examples may, however, be given. Filing a bill,⁶ or causing summons to issue thereon,⁷ may be sufficient without actual service, though it is usually provided that there must be a *bona fide* and diligent attempt to serve such summons. If the summons is irregular but is not a nullity limitations stops when it issues,⁸ even though it is set aside on direct attack. Issuing a summons signed in blank, is not a commencement of an action where such process is a nullity.⁹ If no summons issues but defendant voluntarily enters his appearance,¹⁰ as by filing a demurrer,¹¹ limitations stops when such appearance is entered. So in a suit by the holder of the mortgage, against the holder of the legal title, intervention by the maker of the note to have the amount due thereon determined stops the run-

⁴ Bank v. Weins, 12 Okla. 502; 71 Pac. 1073.

⁵ Louis Sniders' Sons v. Armendt, 105 Ky. 317; 88 Am. St. Rep. 306; 49 S. W. 10.

⁶ In equity. Cowan v. Donaldson, 95 Tenn. 322; 32 S. W. 457.

⁷ Fairbanks v. Farwell, 141 Ill. 354; 30 N. E. 1056.

⁸ German Ins. Co. v. Frederick, 58 Fed. 144.

⁹ Johnson v. Turnell, 113 Wis. 468; 89 N. W. 515.

¹⁰ Reliance Trust Co. v. Atherton, — Neb. —; 93 N. W. 150; Hotchkiss v. Aukermann, 65 Neb. 177; 90 N. W. 949.

¹¹ Hawkins v. Donnerberg, 40 Or. 97; 66 Pac. 691; 66 Pac. 908.

ning of the statute.¹² To suspend the running of the statute it is not necessary that the creditor should be the plaintiff in the action. If he is made a party to the action, and sets up his claim therein in a proper manner, whether by formal pleading or not, the statute stops running. Thus filing a complaint against an insolvent corporation and showing claims,¹³ or presenting claims and commencing an action to sequester the property of the corporation,¹⁴ or presenting a judgment to the probate court for classification,¹⁵ or filing a foreclosure suit in which a deficiency judgment is asked against defendants who are personally liable on the mortgage notes,¹⁶ each stop the running of the statute. However, the institution of a creditor's suit does not stop limitations from running against the claims of a creditor not made a party thereto.¹⁷ Limitations is generally held to stop running against a counterclaim when the suit is commenced in which such counterclaim is pleaded,¹⁸ though some courts limit this rule to the use of such set-off as a defense solely.¹⁹ Some apply the rule even where the set-off is used as a basis for affirmative relief,²⁰ and some hold that limitations runs against a set-off until it is set up in a cross-petition.²¹ Where suit cannot be brought against a state, or can be brought on in a specified manner, and the state has provided for a method of presenting claims, such presentation stops limitations.²² Thus a claim against the United States, presented to the treasury before the end of the period of limitations, and transmitted to the Court of Claims after such period,

¹² *Bank v. Alter*, 61 Neb. 359; 85 N. W. 300.

¹³ *London, etc., Mortgage Co. v. Improvement Co.*, 84 Minn. 144; 86 N. W. 872.

¹⁴ *Potts v. Park Association*, 84 Minn. 217; 87 N. W. 604.

¹⁵ *McFaul v. Haley*, 166 Mo. 56; 65 S. W. 995.

¹⁶ *Patrick v. Bank*, 63 Neb. 200; 88 N. W. 183.

¹⁷ *Callaway's Administrator v. Saunders*, 99 Va. 350; 38 S. E. 182.

¹⁸ *McDougald v. Hulet*, 132 Cal.

154; 64 Pac. 278; *McEwing v. James*, 36 O. S. 152; *Lenhardt v. French*, 57 S. C. 493; 35 S. E. 761; *Lewis v. Turnley*, 97 Tenn. 197; 36 S. W. 872.

¹⁹ *Ware v. Howly*, 68 Ia. 633; 27 N. W. 789.

²⁰ *Steere v. Brownell*, 124 Ill. 27; 15 N. E. 26.

²¹ *Rowan v. Chenoweth*, 49 W. Va. 287; 87 Am. St. Rep. 796; 38 S. E. 544.

²² *Coxe v. State*, 144 N. Y. 396;

29 N. E. 400

is not barred by limitations.²³ If the plaintiff's bill or complaint is filed before the period of limitations has expired, and an amendment thereto is filed after the period of limitations has expired, the question arises whether the amendment dates back to the original pleading for the purpose of the statute of limitations. This depends on whether the amendment sets up the same facts and makes out the same cause of action as the original pleading or not. If it does it dates back to the original pleading,²⁴ even if it gives a more accurate description of the written instrument on which the action is based,²⁵ or seeks different relief.²⁶ Thus if a mortgagee brings an action at law against a grantee who has assumed a mortgage debt and fails because in that jurisdiction, such relief is held to be equitable, he may amend even after limitations has run and seek subrogation,²⁷ such liberty of amendment being otherwise proper. So a suit to foreclose a mortgage has been held to stop limitations on a note secured thereby,²⁸ and if a complaint is filed before limitations has run, based on a note, an amendment filed after limitations has run which sets up a mortgage securing such note, dates back to the original complaint.²⁹ An amendment to a suit on a note whereby the holder is substituted for the payee has been held not to be a new cause of action within the application of the statute of limitations.³⁰ An amendment changing the theory of defendant's liability from individual liability to liability as an individual doing business under a partnership name does not set up a new cause of action.³¹ An amendment which sets up a new cause of action does not date back to the time of filing the original pleading for the purposes of limitations.³² Thus

²³ *United States v. New York*, 160 U. S. 598.

²⁴ *Easter v. Riley*, 79 Miss. 625; 31 So. 210.

²⁵ *Chambers v. Loan Association*, 126 Ala. 296; 28 So. 636.

²⁶ *Kent v. Savings Union*, 130 Cal. 401; 62 Pac. 620.

²⁷ *Woodcock v. Bostic*, 128 N. C. 243; 38 S. E. 881.

²⁸ *Harris v. Schneider Co. (Neb.)*, 91 N. W. 250.

²⁹ *Frost v. Witter*, 132 Cal. 421; 84 Am. St. Rep. 53; 64 Pac. 705.

³⁰ *Service v. Bank*, 62 Kan. 857; 62 Pac. 670.

³¹ *Padden v. Clark*, — Ia. —; 99 N. W. 152.

³² *Campbell v. Campbell*, 133 Cal. 33; 65 Pac. 134; *Phoenix Lumber Co. v. Water Co.*, 94 Tex. 456; 61

if the original pleading filed before limitations has run sets up a cause of action based on an express contract to furnish water sufficient to protect property from fire, an amendment filed after limitations has run which abandons the express contract and sets up facts to show a legal duty to furnish such water is filed too late.³³ In an action brought upon a contract after the court held that the contract was within the statute of frauds an amendment was filed to enable the plaintiff to recover in assumpsit. Such amendment was held not to relate back to the first pleading.³⁴ So if the original pleading alleges a loan to defendant, an amendment which abandons the theory of a loan and alleges that money was obtained by defendant's agent through forgery, and that such money came to defendant's hands, does not date back to the time of filing the original pleading.³⁵ So if the new promise made after limitations has run is looked on as the cause of action, a pleading declaring on the original cause of action does not stop limitations from running against the new promise, and an amendment filed after limitations has run is filed too late.³⁶

V. NEW PROMISE.

§1673. Effect of new promise.

The statute of limitations does not operate as a discharge of the debt, but as a bar to any action thereon. The original debt, while not enforceable in a direct action, has still some effect in law. Thus it is a consideration sufficient to support a promise based thereon, either to pay such debt,¹ or to do some other

S. W. 707; *Howard v. Windom*, 86 Tex. 560; 26 S. W. 483; *Boyd v. Fire Association*, 116 Wis. 155; 96 Am. St. Rep. 948; 61 L. R. A. 918; 90 N. W. 1086; 94 N. W. 171.

³³ *Phoenix Lumber Co. v. Water Co.*, 94 Tex. 456; 61 S. W. 707.

³⁴ *Hamilton v. Thurston*, 94 Md. 253; 51 Atl. 42.

³⁵ *Campbell v. Campbell*, 133 Cal. 33; 65 Pac. 134.

³⁶ *Howard v. Windom*, 86 Tex. 560; 26 S. W. 483.

¹ *Koons v. Vauconsant*, 129 Mich. 260; 95 Am. St. Rep. 438; 88 N. W. 630; *Perkins v. Cheney*, 114 Mich. 567; 68 Am. St. Rep. 495; 72 N. W. 595; *Lang v. Gage*, 66 N. H. 624; 32 Atl. 155; *Richard's Estate*, 185 Pa. St. 155; 39 Atl. 1117; *Suber v. Richards*, 61 S. C. 393; 39 S. E. 540.

thing in discharge of such liability. Accordingly, a promise made after the period of limitations has elapsed, will create a legal and enforceable liability on the part of the promisor.² The original statutes made no reference to the effect of a promise to pay a debt which had once been barred by statute. The doctrine upon this point was therefore one evolved by the courts, and is an example of judicial legislation. Such statutes as have been passed upon the subject are generally statutes designed to restrict or modify the Common Law rule which the courts had been applying to such cases. A promise to pay a debt barred by limitations revives a mortgage given to secure it,³ even as against intervening lien creditors.⁴ There is a divergence of authority as to whether such liability is a revivor of the former liability, or a new liability created by express agreement, the original liability serving merely as a consideration therefor. Some authorities hold that the cause of action is on the new contract.⁵ Other courts hold that the cause of action is on the original liability, the new promise being used merely to prevent

²Maize v. Bradley (Ky.), 64 S. W. 655; Hollandsworth v. Squires (Tenn. Ch. App.), 56 S. W. 1044.

³Robinson v. Basso's Administrator, 100 Va. 190; 40 S. E. 660.

⁴Robinson v. Basso's Administrator, 100 Va. 190; 40 S. E. 660.

⁵McCormick v. Brown, 36 Cal. 180; 95 Am. St. Rep. 170; Chabot v. Tucker, 39 Cal. 434; Biddell v. Brizzolara, 56 Cal. 374; Rodgers v. Byers, 127 Cal. 528; 60 Pac. 42; Little v. Blunt, 9 Pick. (Mass.) 488; Hill v. Henry, 17 Ohio 9; Martin v. Jennings, 52 S. C. 371; 29 S. E. 807; Fleming v. Fleming, 33 S. C. 505; 26 Am. St. Rep. 694; 12 S. E. 257; Walters v. Kraft, 23 S. C. 578; 55 Am. Rep. 44; Smith v. Caldwell, 15 Rich. L. (S. C.) 365; McKelvey v. Tate, 3 Rich. Law (S. C.) 339; Interstate, etc., Association v. Goforth, 94 Tex. 259;

59 S. W. 871; Howard v. Windom, 86 Tex. 560; 26 S. W. 483; Womack v. Womack, 8 Tex. 397; 58 Am. Dec. 119; Ireland v. Mackintosh, 22 Utah 296; 61 Pac. 901; Walker v. Henry, 36 W. Va. 100; 14 S. E. 440. One of the conclusions reached by the court as settled law was "That where the statutory period, counting from the original accrual of the cause of action, expired before commencement of the suit, a promise shown for the purpose of opposing the plea of the statute is itself the true cause of action, and this, whether such promise was made before or after the expiration of the period just mentioned." Smith v. Caldwell, 15 Rich. (S. C.) 365, 373; quoted in Fleming v. Fleming, 33 S. C. 505, 509; 26 Am. St. Rep. 694; 12 S. E. 257.

the bar of limitations from being interposed.⁶ By other authorities a more rational and less pedantic view is taken, namely that if the facts are properly on the record, the plaintiff may take either theory of his case.⁷ The question might be dismissed as an academic discussion as to the best way of stating a proposition as to the real nature of which there was no question if it were not for the fact that important legal consequences follow the choice by the plaintiff of one or the other theories of his case. Thus if the cause of action is on the new promise, it must have been made before the action is brought,⁸ and in states which take this view of the law plaintiff cannot recover as against the plea of the statute of limitations if he has alleged the original contract for his cause of action.⁹ Like other promises, a promise which revives a debt barred by limitations may be express or implied. The doctrine of implied contract, whereby a barred debt is revived, is complicated with another question, which is a survival of the original dispute with reference to the force and effect of the statute of limitations. The statute of limitations was at one time looked upon as a statute of presumption. When such view obtained any acknowledgment which would rebut the presumption of payment would revive a debt which would otherwise be barred by the statute of limitations. As we have seen, however, the present theory of the statute of limitations is that it is a statute of repose, and not a statute of presumption. The reason therefore which underlies many of the earlier decisions that certain forms of acknowledgment were sufficient, has entirely disappeared. The difficulty found in modern cases on this point arises out of the willingness of some courts to follow the earlier precedents, although the reason for such holdings has ceased,

⁶ *Vinson v. Palmer*, — Fla. —; 34 So. 276; *Keener v. Crull*, 19 Ill. 189; *Fiske v. Needham*, 11 Mass. 452; *Esselstyn v. Weeks*, 12 N. Y. 635; *Coffin v. Secor*, 40 O. S. 637; 48 Am. Rep. 689.

⁷ *Lonsdale v. Brown*, 4 Wash. (U. S. C. C.) 86; *Polk v. Butterfield*, 9 Colo. 325; 12 Pac. 216; *Haymaker*

v. Haymaker, 4 O. S. 272, where the court says "The better practice in such case would be to make the issue of the subsequent promise by replication."

⁸ *Martin v. Jennings*, 52 S. C. 371; 29 S. E. 807.

⁹ *Hill v. Henry*, 17 Ohio 9.

while other courts decline to follow such precedents. A promise to pay a debt made before limitations has run against it waives so much of the period of limitations as has already elapsed and creates a new point of time from which limitations runs afresh.¹⁰ While recognized as an established rule this doctrine has been criticised.¹¹ A promise before limitations has run does not create a new obligation,¹² and is not subject to the rules which control a promise made after limitations has run.¹³ Such a positive and unqualified acknowledgment as is necessary if the promise is made after limitations has run is not necessary if the promise is made before limitations has run.¹⁴

§1674. Identification of debt.

In order to revive a barred debt, the new promise must refer to it in such a way as to identify it.¹ Such reference must be plain and unmistakable.² If there are several different claims existing between the creditor and the debtor, a new promise to be enforceable must indicate with reasonable certainty to what claim the debtor refers.³ Hence a promise which may refer, either to an account already barred or to one not yet barred,

¹⁰ *Kelly v. Telle*, 66 Ark. 464; 51 S. W. 633; *Newhall v. Hatch*, 134 Cal. 269; 55 L. R. A. 673; 66 Pac. 266; *London, etc., Bank v. Parrott*, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164; *London, etc., Bank v. Bandmann*, 120 Cal. 220; 65 Am. St. Rep. 179; 52 Pac. 583; *Southern Pacific Co. v. Prosser*, 122 Cal. 413; 55 Pac. 145; *McConaughy v. Wilsey*, 115 Ia. 589; 88 N. W. 1101; *Lindsey v. Lyman*, 37 Ia. 206; *Penley v. Waterhouse*, 3 Ia. 418; *Rankin v. Anderson* (Ky.), 69 S. W. 705.

¹¹ *McConaughy v. Wilsey*, 115 Ia. 589; 88 N. W. 1101.

¹² *Southern Pacific Co. v. Prosser*, 122 Cal. 413; 55 Pac. 145.

¹³ *Rankin v. Anderson* (Ky.), 69 S. W. 705.

¹⁴ *Rankin v. Anderson* (Ky.), 69 S. W. 705.

¹ *Sears v. Hicklin*, 3 Colo. App. 331; 33 Pac. 137; *Stout v. Marshall*, 75 Ia. 498; 39 N. W. 808; *Ashby v. Washburn*, 23 Neb. 571; 37 N. W. 267; *Hancock v. Melloy*, 189 Pa. St. 569; 42 Atl. 292; *Cole's Executor v. Martin*, 99 Va. 223; 37 S. E. 907.

² *Paille v. Plant*, 109 Ga. 247; 34 S. E. 274.

³ *Thomas v. Carey*, 26 Colo. 485; 58 Pac. 1093; *Buckingham v. Smith*, 23 Conn. 453; *Smith v. Moulton*, 12 Minn. 352; *Cole's Executor v. Martin*, 99 Va. 223; 37 S. E. 907.

is not sufficient to remove the bar as to the former account.⁴ According to some authorities, a promise which in fact is merely a promise to pay what may prove to be due, if anything, is not a promise sufficient to revive a debt.⁵ Thus a statement "Whatever is due is ready, as it has been for seven years, whenever I can safely pay either you or" another party named, shows such doubt as to the amount due, and to whom it is due, that it does not stop the running of the statute.⁶ So a promise, "I'll pay you all I owe you," is not a sufficient acknowledgment.⁷ A was liable to B on six different bills of exchange. A promise in writing "to work it off as soon as possible," without identifying the debt further, is not sufficient.⁸ If a written promise to pay a debt refers to some specific liability, without stating the amount due, parol evidence is admissible to identify the debt in question, and to show how much is due thereon.⁹ It is a question of fact whether a new promise refers to a debt barred by limitations or not.¹⁰ If only one debt exists between the parties, a promise by the debtor to pay all that he owes, has been held sufficient without further identification of the debt.¹¹ If a debtor promises to pay all the notes and bills held by the creditor against him at the date of such promise "as shown by the same and in the manner shown by the same," and the debtor admits that such bills are just and unpaid, the amount thereof and the items thereof may be shown by extrinsic evidence.¹²

⁴ *Cole's Executor v. Martin*, 99 Va. 223; 37 S. E. 907. See to the same effect, *Thomas v. Carey*, 26 Colo. 485; 58 Pac. 1093.

⁵ *Ward v. Jack*, 172 Pa. St. 416; 51 Am. St. Rep. 744; 33 Atl. 577; *Liskey v. Paul*, 100 Va. 764; 42 S. E. 875.

⁶ *Braithwaite v. Harvey*, 14 Mont. 208; 43 Am. St. Rep. 625; 27 L. R. A. 101; 36 Pac. 38.

⁷ *Miller v. Baschore*, 83 Pa. St. 356; 24 Am. Rep. 187.

⁸ *Opp v. Wack*, 52 Ark. 288; 5 L. R. A. 743; 12 S. W. 565.

⁹ *First National Bank v. Woodman*, 93 Ia. 668; 57 Am. St. Rep. 287; 62 N. W. 28; *Patterson v. Neuer*, 165 Pa. St. 66; 30 Atl. 748.

¹⁰ *Beale v. Nind*, 4 B. & Ald. 568; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *Wilcox v. Clarke*, 18 R. I. 324; 27 Atl. 219; *Shaw v. Newell*, 2 R. I. 264.

¹¹ *O'Hara v. Murphy*, '196 Ill. 599; 63 N. E. 1081.

¹² *Pollak v. Billing*, 131 Ala. 519; 32 So. 639.

§1675. Promise must show intention to pay debt.

The language used by the debtor must be such as to show his intention to pay the debt referred to.¹ If the debtor says that he is unable or unwilling to pay a debt, the fact that he does not deny the validity of the debt does not, according to the weight of authority, constitute an implied promise to pay it.² Thus the statement "I have done my best to raise some money, but I cannot do it now. . . . But some money we will send you but not all because we must live first," has been held not to waive the bar of the statute.³ So a statement by the debtor that he would pay the debt if he were able, is not sufficient.⁴ So a statement by a debtor that he is trying to collect a claim due to himself and that he can do no more than pay his creditor when he collects such debt is not sufficient.⁵ So statements "I know we are owing you and I am anxious it should be settled," and "It is not our wish to keep from you whatever may be your just due," are insufficient as a new promise if coupled with a statement of financial inability to pay.⁶ In opposition to this view it has been held that a debtor's statement, "I can not pay it now as I have two members of my family now to support," is an implied promise to pay the debt some time in the future.⁷ According to the weight of authority, the promise to pay when he can, is not a sufficient promise to revive a barred debt.⁸ Where a debtor wrote, "It will be impossible to pay you anything until after the first of June. I will send you a check for something then. I hope to be able to clear your ac-

¹ Ennis v. Car Co., 165 Ill. 161; 46 N. E. 439; Johnston v. Hussey, 92 Me. 92; 42 Atl. 312.

² Wald v. Arnold, 168 Mass. 134; 46 N. E. 419; Manning v. Wheeler, 13 N. H. 486; Pierce v. Seymour, 52 Wis. 272; 38 Am. Rep. 737; 9 N. W. 71.

³ Krueger v. Kreuger, 76 Tex. 178; 7 L. R. A. 72; 12 S. W. 1004.

⁴ Manning v. Wheeler, 13 N. H. 486.

⁵ Cook v. Farley, 1 Neb. Unofficial 540; 95 N. W. 683.

⁶ Bell v. Morrison, 1 Pet. (U. S.) 351.

⁷ Beeler v. Clarke, 90 Md. 221; 78 Am. St. Rep. 439; 44 Atl. 1038.

⁸ Richardson v. Bricker, 7 Colo. 58; 49 Am. Rep. 344; 1 Pac. 433; Halladay v. Weeks, 127 Mich. 363; 89 Am. St. Rep. 478; 86 N. W. 799; Wilcox v. Williams, 5 Nev. 206; Parker v. Butterworth, 46 N. J. Law, 244; 50 Am. Rep. 407; Cooper v. Jones, 128 N. C. 40; 38 S. E. 28.

ount quick," such statement was not sufficient to revive the debt.⁹ A promise to pay whatever the debtor is able to pay, is insufficient.¹⁰ A promise to "pay him something on account in a few days,"¹¹ has been held sufficient. A promise to pay when able may, however, be enforceable as a new contract on which the debtor is liable when he becomes able.¹² An action cannot be maintained against him until he is in fact able to pay.¹³ The statute runs against such new promise from the time when the debtor becomes able to pay and not from the time that he makes new promise.¹⁴ A statement by a debtor that he has no money at that time, and will not have any until he sells a specified piece of property, and that then it will be all right between them, does not create any liability enforceable by the creditor until such property is sold.¹⁵ A promise by the debtor to pay a specified sum, which is less than the entire debt, revives his liability as to the sum thus indicated,¹⁶ but does not revive his liability as to the entire amount of the original debt.¹⁷ So the statement that the debtor thought that his former partner had "paid that debt but as he did not settle it I'll see into it some time," did not amount to a new promise to pay the debt, as it might mean that he would try to make his partner pay it.¹⁸ Only voluntary acts of the debtor can amount to a new promise. Thus the entry of a judgment on

⁹ *Lambert v. Doyle*, 117 Ga. 81; 43 S. E. 416.

¹⁰ *Nelson v. Hanson*, 92 Ia. 356; 54 Am. St. Rep. 568; 60 N. W. 655; *Boynton v. Moulton*, 159 Mass. 248; 34 N. E. 361.

¹¹ *Wilcox v. Clarke*, 18 R. I. 324; 27 Atl. 219.

¹² *St. Louis, etc., Ry. v. Rice*, 170 Ill. 354; 48 N. E. 974; affirming, 69 Ill. App. 244; *Jenckes v. Rice*, 119 Ia. 451; 93 N. W. 384; *Mumford v. Freeman*, 8 Met. (Mass.) 432; 41 Am. Dec. 532; *Scott v. Thornton*, 104 Tenn. 547; 58 S. W. 236; *Gardenhire v. Rogers* (Tenn. Ch. App.), 60 S. W. 616.

¹³ *Rodgers v. Byers*, 127 Cal. 528; 60 Pac. 42.

¹⁴ *Scott v. Thornton*, 104 Tenn. 547; 58 S. W. 236.

¹⁵ *Keenan v. Keenan*, 20 R. I. 105; 37 Atl. 632.

¹⁶ *McKisson v. Davenport*, 83 Mich. 211; 10 L. R. A. 507; 47 N. W. 100; *Mooar v. Mooar*, 69 N. H. 643; 46 Atl. 1052.

¹⁷ *Mooar v. Mooar*, 69 N. H. 643; 46 Atl. 1052.

¹⁸ *Liberman v. Gurensky*, 27 Wash. 410; 67 Pac. 998. (Especially as the context showed that he was not in financial condition to pay them, though he might be at a future time.)

notes is not such a new promise as to extend limitations on the mortgage securing the debt.¹⁹ If, however, the debtor expresses in unequivocal language his intention of paying the debt, the fact that with the consent of his creditor he fixes the time of payment in the future, as at the death of the debtor,²⁰ or that he agrees to satisfy the debt by a legacy in his will,²¹ does not prevent such promise from operating as a waiver of the bar.

§1676. Giving new note or new collateral.

If a creditor furnishes new collateral,¹ or gives a mortgage,² to secure a barred debt, or gives an order on a third person to secure such debt,³ the barred debt is thereby revived. The new period of limitations runs from the date of the collection of such order if the creditor uses good faith in making the collection, and not the date of the acceptance of the order.⁴ If the debtor executes a new note, evidencing a debt barred by limitations, such debt is thereby revived.⁵ The same effect has been held to follow a promise to execute a new note, even though such new note has not been executed.⁶ If, however, the debtor executes a note as mere duplicate evidence of the original debt, such duplicate does not operate to revive a barred debt, or prevent limitations from running.⁷ If the debtor offers to give a new note he waives the bar of the statute, even if he concludes, "If you think a note worthless, what will you take in cash and balance all I owe you."⁸

¹⁹ *Hanna v. Kasson*, 26 Wash. 568; 67 Pac. 271.

²⁰ *Neish v. Gannon*, 198 Ill. 219; 64 N. E. 1000.

²¹ *Gill v. Donovan*, 96 Md. 518; 54 Atl. 117.

¹ *Hampton v. France* (Ky.), 32 S. W. 950; *Wolford v. Cook*, 71 Minn. 77; 70 Am. St. Rep. 315; 73 N. W. 706; *Taylor v. Hunt*, 118 N. C. 168; 24 S. E. 359. *Contra*, *Shepherd v. Thompson*, 122 U. S. 231.

² *Maddox v. Walker's Executrix* (Ky.), 74 S. W. 741.

³ *Buffington v. Chase*, 152 Mass.

534; 10 L. R. A. 123; 25 N. E. 977; *Manchester v. Braedner*, 107 N. Y. 346; 1 Am. St. Rep. 829; 14 N. E. 405.

⁴ *Buffington v. Chase*, 152 Mass. 534; 10 L. R. A. 123; 25 N. E. 977.

⁵ *Wilcox v. Gregory*, 135 Cal. 217; 67 Pac. 139.

⁶ *Bowman v. Rector* (Tenn. Ch. App.), 59 S. W. 389.

⁷ *School District v. Cromer*, 52 Ark. 454; 6 L. R. A. 510; 12 S. W. 878; *Goodrich v. Case*, 68 O. S. 187; 67 N. E. 295.

⁸ *Rumsey v. Settle*, 120 Mich. 372; 79 N. W. 579.

§1677. To whom promise may be made.

In order to operate as a waiver of the bar of the statute of limitations, the new promise may be made to the creditor himself, or to his agent.¹ A promise made to a stranger to the contract has no legal effect as a waiver of the bar of the statute.² However, a stranger whom the debtor intended to communicate such promise to the creditor is for this purpose agent of one of the parties; and when the promise is communicated to the creditor it binds the debtor.³ If the claim which is barred by the statute of limitations has been assigned, a promise made to the assignor before such assignment operates as a waiver of the bar.⁴ A promise made to the assignor after the assignment, and while the debtor is in ignorance thereof, does not amount to a waiver of the bar.⁵ Thus the acknowledgment of a mortgage debt made by the grantee of realty subject to such mortgage to the former owner of the mortgage debt, after he has assigned it, does not waive the bar of the statute.⁶

§1678. By whom promise may be made.

The new promise may be made by the debtor himself, or by his agent thereunto duly authorized.¹ One whom the debtor has requested to convey his promise to the creditor, is the agent of the debtor within the meaning of this rule. Thus where the debtor sent for the creditor's sister, and asked her to tell the creditor that the debtor would pay every cent that he owed him, the creditor's sister was the defendant's agent for that purpose.²

¹ Kirby v. Mills, 78 N. C. 124; 24 Am. Rep. 460.

² Niblack v. Goodman, 67 Ind. 174; Schmucker v. Sibert, 18 Kan. 104; 26 Am. Rep. 765; Spangler v. Spangler, 122 Pa. St. 358; 9 Am. St. Rep. 114; 15 Atl. 436.

³ Miller v. Teeter, 53 N. J. Eq. 262; 31 Atl. 394.

⁴ Bird v. Adams, 7 Ga. 505; Soulden v. Van Rensselaer, 9 Wend. (N. Y.) 293.

⁵ Investment Securities Co. v.

Bergthold, 60 Kan. 813; 58 Pac. 469.

⁶ Investment Securities Co. v. Bergthold, 60 Kan. 813; 58 Pac. 469.

¹ O'Hara v. Murphy, 196 Ill. 599; 63 N. E. 1081.

² O'Hara v. Murphy, 196 Ill. 599; 63 N. E. 1081. A new promise made by one of two or more joint debtors, waives the bar of the statute as to himself, but not as to the other joint debtors. State, etc., Co.

An express promise by the grantee of mortgaged premises suspends the running of the statute of limitations against the foreclosure of the mortgage lien.³ A new promise by executors is not binding on the estate according to the weight of authority,⁴ and even if such promise was relied upon by the creditor and induced him to delay until limitations had run, and if the executors are thereby estopped to plead limitations, other creditors may plead limitations.⁵ Other authorities hold that such new promise revives the barred debt as against the estate.⁶

VI. ACKNOWLEDGMENT.

§1679. Doctrine of acknowledgment.

When the statute of limitations was treated as a rule of presumption merely, any form of acknowledgment which conceded the fact that the claim was unpaid, was sufficient to rebut the presumption of payment.¹ Now that the statute of limitations is treated as one of repose, the general rule is that an acknowledgment of a debt barred by the statute waives the bar of the statute only when the acknowledgment is in such form as to amount to an implied promise to discharge the debt.²

v. Cochran, 130 Cal. 245; 62 Pac. 466, 600; Boynton v. Spafford, 162 Ill. 113; 53 Am. St. Rep. 274; 44 N. E. 379; affirming, 61 Ill. App. 384; Drake v. Stuart, 87 Ia. 341; 54 N. W. 223; Koons v. Vauconsant, 129 Mich. 260; 95 Am. St. Rep. 438; 88 N. W. 630; Muse v. Donelson, 2 Humph. (Tenn.) 166; 36 Am. Dec. 309. *Contra*, that a new promise by one joint debtor waives the bar as to all. Bound v. Lathrop, 4 Conn. 336; 10 Am. Dec. 147; Casebolt v. Ackerman, 46 N. J. L. 169; Hollister v. York, 59 Vt. 1; 9 Atl. 2.

³ Neosho Valley Investment Co. v. Huston, 61 Kan. 859; 59 Pac. 643.

⁴ Cape Girardeau County v. Har-

bison, 58 Mo. 90; *In re Claghorn's Estate*, 181 Pa. St. 600; 59 Am. St. Rep. 680; 37 Atl. 918; Fritz v. Thomas, 1 Whart. (Pa.) 66; 29 Am. Dec. 39; Moore v. Hillebrant, 14 Tex. 312; 65 Am. Dec. 118.

⁵ *In re Claghorn's Estate*, 181 Pa. St. 608; 37 Atl. 921; Kittera's Estate, 17 Pa. St. 416.

⁶ Browning v. Paris, 5 M. & W. 117; Pollard v. Scears, 28 Ala. 484, 65 Am. Dec. 364; Northcut v. Wilkinson, 12 B. Mon. (Ky.) 408; Emerson v. Thompson, 16 Mass. 429.

¹ Dowthwaite v. Tibbut, 5 M. & S. 75; Austin v. Bostwick, 9 Conn. 496; 25 Am. Dec. 42; Cobham v. Administrators, 2 Hayw. (N. C.) 6; 2 Am. Dec. 612.

² Fort Scott v. Hickman, 112 U.

"Loose and general expressions with respect to the acknowledgment of a debt barred by the statute which are merely casual are insufficient to remove the bar."³ In order to amount to an implied promise to pay, the acknowledgment must recognize the debt as a present existing liability.⁴ Nothing short of this will amount by implication to a promise to discharge the debt.⁵

§1680. Mere recognition of existence of debt insufficient.

The mere acknowledgment of the existence of the debt which does not treat it as a present subsisting liability is insufficient.¹ It is not sufficient that the reference to the debt should be consistent with its validity.² To amount to an acknowledgment the reference must unequivocally show that the debt is treated as valid and subsisting. Thus publishing the debt in question in an official list of liabilities,³ as in a list of liabilities pub-

S. 150; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Pierce v. Merrill*, 128 Cal. 473; 79 Am. St. Rep. 63; 61 Pac. 67; *Ensign v. Batterson*, 68 Conn. 298; 36 Atl. 51; *Ennis v. Palace Car Co.*, 165 Ill. 161; 46 N. E. 439; *Schonbachler v. Schonbachler* (Ky.), 57 S. W. 233; *Johnston v. Hussey*, 89 Me. 488; 36 Atl. 993; *Ritter's Estate*, 161 Pa. St. 79; 28 Atl. 1011; *Stiles v. Coal Co.*, 47 W. Va. 838; 35 S. E. 986; *Pierce v. Seymour*, 52 Wis. 272; 38 Am. Rep. 737; 9 N. W. 71. "An acknowledgment cannot be regarded as an admission of indebtedness where the accompanying circumstances are such as to repel that inference or to leave it in doubt whether the party intended to prolong the time of legal limitation." *Fort Scott v. Hickman*, 112 U. S. 150, 163.

³ *Thomas v. Carey*, 26 Colo. 485, 490; 58 Pac. 1093.

⁴ *Kelly v. Strouse*, 116 Ga. 872; 43 S. E. 280; *Shack v. Sexton*, 113 Ga. 617; 38 S. E. 946; *Olney v.*

Jackson, 106 Ind. 286; 4 N. E. 149; *Durban v. Knowles*, 66 Kan. 397; 71 Pac. 829; *Haythorn v. Cooper*, 65 Kan. 338; 69 Pac. 333; *Ditto v. Ditto*, 4 Dana (Ky.) 502; *Henry v. Zurflieh*, 203 Pa. St. 440; 53 Atl. 243; *Thompson v. French*, 10 Yerg. (Tenn.) 452.

⁵ "Statutes of limitation are statutes of repose and not merely statutes of presumption of payment. Therefore to deprive a debtor of the benefit of such a statute by an acknowledgment of indebtedness there must be an acknowledgment to the creditor as to the particular claim and it must be shown to have been intentional." *Fort Scott v. Hickman*, 112 U. S. 150, 163.

¹ *Succession of Slaughter*, 108 La. 492; 58 L. R. A. 408; 32 So. 379; *Prescott v. Vershire*, 63 Vt. 517; 22 Atl. 655.

² *Hanson v. Toole*, 19 Kan. 273.

³ *Fort Scott v. Hickman*, 112 U. S. 150.

lished by a bank in compliance with the law,⁴ or in an official statement of a city's indebtedness,⁵ or in a schedule of debts in bankruptcy or insolvency,⁶ is not a sufficient acknowledgment. In most of the latter cases, the acknowledgment is also defective as not made to the debtor. So a letter by a guarantor of a debt of a corporation acknowledging the debt as binding on the corporation but not referring to his own contract of guaranty, is not an acknowledgment of his contract.⁷ In some states an admission in effect that the debtor "owed the debt and that it remained unpaid,"⁸ even if there is "no expression of willingness to remain bound,"⁹ is sufficient. Thus an admission that the debt is valid, even if coupled with a statement of present financial inability to pay,¹⁰ has been held sufficient.

§1681. Negotiations for settlement insufficient.

The fact that the debtor entered into negotiations with the creditor to ascertain the terms on which the debt in question could be settled,¹ or that he offers a compromise,² as by attempting to buy the note in question,³ is not sufficient. An offer to

⁴ *Blades v. Bank (Ky.)*, 56 S. W. 415.

⁵ *Prescott v. Vershire*, 63 Vt. 517; 22 Atl. 655.

⁶ *Davies v. Edwards*, 7 Exch. 22; *Richardson v. Thomas*, 13 Gray (Mass.) 381; 74 Am. Dec. 636; *Stoddard v. Doane*, 7 Gray (Mass.) 387; *Roscoe v. Hale*, 7 Gray (Mass.) 274; *Hidden v. Cozzens*, 2 R. I. 401; 60 Am. Dec. 93.

⁷ *Pierce v. Merrill*, 128 Cal. 473; 79 Am. St. Rep. 63; 61 Pac. 67.

⁸ *Elliott v. Leake*, 5 Mo. 208, 210; 32 Am. Dec. 314; quoted in *Chidsey v. Powell*, 91 Mo. 622, 626; 60 Am. Rep. 267; 4 S. W. 446.

⁹ *Chidsey v. Powell*, 91 Mo. 622, 627; 60 Am. Rep. 267; 4 S. W. 446.

¹⁰ *Chidsey v. Powell*, 91 Mo. 622;

60 Am. Rep. 267; 4 S. W. 446; *Boyd, Adm'r of Carr, v. Hurlbut*, 41 Mo. 264.

¹ *Thomas v. Carey*, 26 Colo. 485; 58 Pac. 1093; *Kelly v. Strouse*, 116 Ga. 872; 43 S. E. 280; *Ennis v. Palace Car Co.*, 165 Ill. 161; 46 N. E. 439; *Schonbachler v. Schonbachler (Ky.)*, 57 S. W. 232; *Mumford v. Freeman*, 8 Met. (Mass.) 432; 41 Am. Dec. 532; *Nelson v. Becker*, 32 Neb. 99; 48 N. W. 962; *Stiles v. Laurel Fork, etc., Coal Co.*, 47 W. Va. 838; 35 S. E. 986.

² *Chism v. Barnes*, 104 Ky. 310; 47 S. W. 232; 47 S. W. 875; *Andrew v. Kennedy*, 4 Okla. 625; 46 Pac. 485.

³ *Connecticut, etc., Co. v. Wead*, 172 N. Y. 497; 92 Am. St. Rep. 756; 65 N. E. 261.

arbitrate,⁴ or to leave the dispute in question to the decision of some third person,⁵ is not sufficient to waive the bar of the statute. Suggesting that some third person could be held liable upon the debt in question, as a letter written by a surety to his principal at the request of the payee urging him to pay the obligation,⁶ or a letter by the executor of one maker of the note to the holder, advising him to look to the surviving maker for payment,⁷ is not a waiver of the bar of the statute. A declaration by the debtor of an intention to make a provision for the creditor by will does not recognize the debt as a subsisting enforceable liability, and does not amount to an acknowledgment.⁸ If, however, there is a distinct promise to pay the debt, the fact that the debtor claims that the creditor should voluntarily make some reduction from the total amount does not make the new promise invalid.⁹

§1682. Identification of debt.

In order to waive the bar of the statute, the acknowledgment must clearly identify the debt to which it relates.¹ An acknowledgment which leaves it uncertain to what debt the debtor referred, is insufficient to waive the bar of the statute.² A written statement that a specified amount is due is not an acknowledgment of the entire debt if it exceeds such specified amount.³

⁴ *Curtis v. Sacramento*, 70 Cal. 412; 11 Pac. 748.

⁵ *Rossiter v. Colby*, 71 N. H. 386; 52 Atl. 927; *Linderman v. Pomeroy*, 142 Pa. St. 168; 24 Am. St. Rep. 494; 21 Atl. 820.

⁶ *Borden v. Fletcher's Estate*, 131 Mich. 220; 91 N. W. 145.

⁷ *King v. Rogers*, 31 Ont. 573.

⁸ *Schonbachler v. Schonbachler* (Ky.), 57 S. W. 232; *Watson v. Barber*, 105 La. 799; 30 So. 127; *Gill v. Staylor*, 97 Md. 665; 55 Atl. 398.

⁹ *McNear v. Roberson*, 12 Ind. App. 87; 39 N. E. 896.

¹ *Lambert v. Doyle*, 117 Ga. 81; 43 S. E. 416; *Wellman v. Miner*, 179 Ill. 326; 53 N. E. 609.

² *Buckingham v. Smith*, 23 Conn. 453; *Kirven v. Thornton*, 110 Ga. 276; 34 S. E. 848; *Stout v. Marshall*, 75 Ia. 498; 39 N. W. 808; *Gibson v. Grosvenor*, 4 Gray (Mass.) 606; *Landis v. Roth*, 109 Pa. St. 621; 58 Am. Rep. 747; 1 Atl. 49.

³ *Porter v. Ry.*, 99 Ia. 351; 68 N. W. 724; *Weare v. Chase*, 58 N. H. 225.

§1683. *Prima facie* effect of recognition as subsisting liability.

A distinct and unqualified admission of a debt as a present subsisting liability, without anything further to rebut the presumption that the debtor promises to pay it, is a sufficient waiver of the bar of the statute.¹ Thus a written statement by the debtor, estimating his liability in excess of what it really was,² or a statement of the debtor that he has received of the creditor a specified sum "at various times to date, which is hereby acknowledged,"³ or a statement by a mortgagor to the mortgagee, "I shall sell our cattle the first chance. I am tired of the business and want to pay off that mortgage,"⁴ or a statement in a memorandum of settlement, "This payment has no bearing upon the amount due (the creditor) by said account dated October 1, 1890,"⁵ or a statement by the debtor when an account is presented to him, that he will settle the account and pay what he owes, but that a certain credit, to which he is entitled, has not been given him, and his acquiescence when the entry of such credit is pointed out to him,⁶ or apologizing for failure to make a payment upon the debt and promising to make a payment thereon if given time,⁷ or a statement by a surety to the payee of the note that the payee must proceed to collect from the principal debtor, and that if it is not promptly collected the surety "will not longer be held good for the note,"⁸ or sending a draft with the statement that it "pays interest" upon a specified note,⁹ or a state-

¹ *Southern Pacific Co. v. Prosser*, 122 Cal. 413; 55 Pac. 145; *Austin v. Bostwick*, 9 Conn. 496; 25 Am. Dec. 42; *Harrell v. Davis*, 108 Ga. 789; 33 S. E. 852; *Babylon v. Dutera*, 89 Md. 444; 43 Atl. 938; *De Kruif v. Flieman*, 130 Mich. 12; 89 N. W. 558; *Rumsey v. Settle*, 120 Mich. 372; 79 N. W. 579; *Hale v. Hale*, 4 Humph. (Tenn.) 183; *Thomas v. Glendinning*, 13 Utah 47; 44 Pac. 652.

² *In re Lorillard*, 107 Fed. 677; 46 C. C. A. 553.

³ *Custy v. Dolan*, 159 Mass. 245; 38 Am. St. Rep. 419; 34 N. E. 360.

⁴ *Reymond v. Newcomb*, 10 N. M. 151; 61 Pac. 205.

⁵ *Savage v. Gaut* (Tenn. Ch. App.), 57 S. W. 170.

⁶ *Bean v. Wheatley*, 13 App. D. C. 473.

⁷ *Brintall v. Graves*, 168 Mass. 384; 47 N. E. 119.

⁸ *Harms v. Freytag*, 59 Neb. 359; 80 N. W. 1039.

⁹ *Campbell v. Campbell*, 118 Ia 131; 91 N. W. 894.

ment by the debtor in response to a demand from the creditor that he keep certain mortgaged realty insured for a certain sum, that the property is enough to cover the debt even if the building were to burn without insurance,¹⁰ have each of them been held to be acknowledgments sufficient to waive the bar of the statute.

§1684. Effect of express refusal to pay debt.

An admission of the existence of the debt, coupled with a refusal to pay it,¹ whether such refusal is based upon the ground of poverty of the debtor,² or on the fact that he is angry because he has been sued,³ or on the fact, though untrue, that the debt has been paid,⁴ or that the debt is barred by limitations,⁵ is insufficient as an acknowledgment. So a statement by a vendee of realty in possession that he believes that he can make a payment in a year and that if he does not make such payment he will give up the land, asking the vendor to "give him a show," is not an unequivocal acknowledgment of a subsisting debt.⁶

§1685. By whom acknowledgment can be made.

Acknowledgment can affect the interests only of the party making the acknowledgment, either in person or by his duly authorized agent. Thus acknowledgment by one joint debtor¹ does not waive the bar of the statute as to the other joint debtor. A written acknowledgment of the existence of a mortgage made by persons who succeeded the mortgagor in interest,

¹⁰ Walsh v. Mayer, 111 U. S. 31.

¹ Fillett v. Linsey, 6 J. J. Mar. (Ky.) 337; Gray v. McDowell, 6 Bush. (Ky.) 475.

² Bullion, etc., Bank v. Hegler, 93 Fed. 890; Wald v. Arnold, 168 Mass. 134; 46 N. E. 419.

³ Rudolph v. Sellers, 106 Ga. 485; 32 S. E. 599.

⁴ Bangs v. Hall, 2 Pick. (Mass.) 368; 13 Am. Dec. 437; Linderman v. Pomeroy, 142 Pa. St. 168; 24

Am. St. Rep. 494; 21 Atl. 820.

⁵ Bangs v. Hall, 2 Pick. (Mass.) 368; 13 Am. Dec. 437.

⁶ Wood v. Merrietta, 66 Kan. 748; 71 Pac. 579.

¹ Boynton v. Spafford, 162 Ill. 113; 53 Am. St. Rep. 274; 44 N. E. 379; affirming, 61 Ill. App. 384; Tate v. Hawkins, 81 Ky. 577; 50 Am. Rep. 181; Meade v. McDowell, 5 Binn. (Pa.) 195; Phelps v. Stewart, 12 Vt. 256.

starts the statute of limitations to running again from the date of such acknowledgment as to the mortgage, although no promise is made to pay the mortgage debt.² The mortgagor cannot, after conveying the realty covered by the mortgage, revive the mortgage as against the grantee by an acknowledgment of the mortgage debt.³ The act of an assignee in bankruptcy in taking possession of premises mortgaged by the bankrupt, and asking for leave to sell the equity of redemption, amounts, *prima facie*, to the recognition of the mortgage, and stops the statute of limitations from running.⁴ Acknowledgment of a mortgage debt by a husband is sufficient to start limitations to running anew as to a mortgage on the homestead executed by husband and wife.⁵ An acknowledgment by an executor is held in some jurisdictions not to bind the estate, though it may amount to a new promise imposing a personal liability upon him.⁶ Some courts hold that if there are two or more executors, the acknowledgment made by one of them binds the decedent's estate.⁷

§1686. To whom acknowledgment can be made.

The acknowledgment, in order to operate as a waiver of the bar of the statute, must be made to the creditor, or to his authorized agent. A letter addressed individually to one member of the creditor firm, acknowledging a debt due to such firm, has been held to be sufficient.¹ An acknowledgment made to a stranger is insufficient to waive the bar of the statute.² Thus where decedent in his last illness told his nurse

² Foster v. Bowles, 138 Cal. 346; 71 Pac. 494.

³ Cook v. Prindle, 97 Ia. 464; 59 Am. St. Rep. 424; 66 N. W. 781.

⁴ Brintnall v. Graves, 168 Mass. 384; 47 N. E. 119.

⁵ Fuller v. McMahan, 64 Kan. 441; 67 Pac. 828.

⁶ Claghorn Estate, 181 Pa. St. 608; 37 Atl. 921; Light's Estate, 136 Pa. St. 211; 20 Atl. 536, 537; Fritz v. Thomas, 1 Whart. (Pa.) 66; 29 Am. Dec. 39.

⁷ In re Macdonald (1897), 2 Ch. 181. See § 1697.

¹ Yarbrough v. Gilland, 77 Miss. 139; 24 So. 170.

² Fort Scott v. Hickman, 112 U. S. 150; Pierce v. Merrill, 128 Cal. 473; 79 Am. St. Rep. 63; 61 Pac. 67; Thomas v. Carey, 26 Colo. 485; 58 Pac. 1093; Niblack v. Goodman, 67 Ind. 174; Spangler v. Spangler, 122 Pa. St. 358; 9 Am. St. Rep. 114; 15 Atl. 436.

that he wanted the creditor paid for certain work, such acknowledgment is insufficient to waive the bar of the statute.³

VII. PART PAYMENT.

§1687. General nature and effect of part payment.

If the debtor voluntarily makes a payment which he intends to be applied upon a debt owing by him, in partial satisfaction thereof, leaving a balance due, such payment is the clearest form of acknowledgment of such debt as a valid and subsisting liability. If such part payment is made before the time fixed by the statute of limitations has expired, it operates to create a new point from which the statute of limitations begins to run afresh.¹ In South Carolina, where the cause of action is held to be the new promise, an allegation of the original cause of action and the payments made thereon before limitations has run is not a statement sufficient to avoid the bar of the statute if the action is brought after the statutory period has elapsed since the maturity of the contract.² Recovery can be had in such cases by alleging the new promise as the cause of action, and using the payment to prove the promise.³ If such part payment is made after the statute of limitations has run, it operates as a waiver of the bar of the statute, and revives the liability of the debtor.⁴ Payment of interest upon a note,

³ *Parker v. Remington*, 15 R. I. 300; 2 Am. St. Rep. 897; 3 Atl. 590.

¹ *Less v. Arndt*, 68 Ark. 399; 59 S. W. 763; *Abner v. York* (Ky.), 41 S. W. 309; *In re Leeds*, 49 La. Ann. 501; 21 So. 617; *Neilands v. Wright*, — Mich. —; 95 N. W. 997; *Miner v. Lorman*, 56 Mich. 212; 22 N. W. 265; *Clarkin v. Brown*, 80 Minn. 361; 83 N. W. 351; *Barnes v. Hardware Co.*, 203 Pa. St. 570; 53 Atl. 378. In Tennessee part payment does not as a matter of law affect the running of the statute. *Lock v. Wilson*, 10

Heisk. (Tenn.) 441; 9 Heisk. (Tenn.) 784.

² *Fleming v. Fleming*, 33 S. C. 505; 26 Am. St. Rep. 694; 12 S. E. 257; *Walters v. Kraft*, 23 S. C. 578; 55 Am. Rep. 44.

³ *Jacobs v. Gilreath*, 45 S. C. 46; 22 S. E. 757.

⁴ *Neish v. Gannon*, 198 Ill. 219; 64 N. E. 1000; *Findlay Brewing Co. v. Brown*, 19 Ohio C. C. 612; 10 Ohio C. D. 100; *Ewbank v. Ewbank*, 64 S. C. 434; 42 S. E. 194; *Lyle v. Esser*, 98 Wis. 234; 73 N. W. 1008. Under Louisiana statutes, part payment after limitations have once run

amounts to a part payment.⁵ Thus A assigned to B a mortgage note executed by X and guaranteed its payment. X made default in interest, but A paid such interest and sued in B's name, though without B's consent, to foreclose the mortgage, and bought the property in at such sale. It was held that such conduct suspended the running of the statute of limitations on A's guaranty.⁶ Part payment does not create a new cause of action. Hence part payment made on a note after a surety thereon has died and before an administrator has been appointed makes limitations run anew from the date of such payment, and does not postpone the running until such administrator is appointed.⁷ Since the theory underlying the doctrine of part payment is that such payment is an implied admission that more is due, it follows that if the circumstances of the payment are such as to rebut the inference of a promise to pay the residue of the debt, the statute of limitations is not thereby prevented from running.⁸ If the payment is not intended to apply upon the liability in question at all, it does not affect the running of the statute.⁹ Thus a payment of interest made directly by a mortgagor to the *cestui que trust* of the fund for life does not prevent limitations from running in favor of the trustees for an innocent breach of trust in making such mortgage loan upon insufficient security.¹⁰

§1688. What may constitute payment.

Part payment is usually made in money. This is not, however, necessary. Anything which is given by the debtor as partial satisfaction of the debt, and which is so received by the creditor, amounts to a part payment within the meaning of

Does not revive the debt. Succession of Slaughter, 108 La. 492; 58 L. R. A. 408; 32 So. 379; Frellsen v. Gantt, 25 La. Ann. 476.

⁵ Lyman v. Warner, 113 Fed. 87; Topeka Capital Co. v. Merriam, 60 Kan. 397; 56 Pac. 757.

⁶ Spink v. Newby, 64 Kan. 883; 67 Pac. 437.

⁷ Copeland v. Collins, 122 N. C. 619; 30 S. E. 315.

⁸ Hale v. Morse, 49 Conn. 481; Weston v. Hodgkins, 136 Mass. 326; Parsons v. Clark, 59 Mich. 414; 26 N. W. 656; Crow v. Gleason, 141 N. Y. 489; 36 N. E. 497.

⁹ Crow v. Gleason, 141 N. Y. 489; 36 N. E. 497.

¹⁰ *In re Somerset* (1894), 1 Ch 231.

this rule.¹ Thus the parties to a note agreed that an indebtedness of the holder of the note to a firm, of which the maker was a member, should be credited upon the note as a part payment thereof. Corresponding entries were made upon the books of the holder of the note and of the firm. This was held to be a part payment sufficient to stop the running of the statute of limitations.² So if after the debt has been contracted the debtor assigns to the creditor choses in action³ to be applied as far as they would go in payment of the debt, this is such part payment as to prevent the statute from running. So personal property delivered and received as part payment on a debt⁴ or work and labor done and accepted in partial satisfaction of a debt⁵ will start the statute to running anew. In order to constitute part payment within the meaning of this rule, something of value must be given by the debtor and received by the creditor. An agreement made by the debtor with the consent of the creditor to remit a part of the debt is not such part payment as prevents limitations from running.⁶ So the creditor's act in giving credit for a payment which the debtor claims that he has already made is not sufficient to prevent the statute from running.⁷ In order to amount to part payment, the thing of value given by the debtor to the creditor must be intended as a partial satisfaction of the debt. A payment of money made by the debtor to the creditor for some other specific purpose cannot be treated by the creditor, without the consent of the debtor, as a part payment on the debt, to prevent the operation of the statute of

¹ Loudon, etc., *Bank v. Parrott*, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164; *Taylor v. Foster*, 132 Mass. 30; *Souder's Estate*, 169 Pa. St. 239; 32 Atl. 417.

² *Vinson v. Palmer*, — Fla. —; 34 So. 276. To the same effect, *McKeon v. Byington*, 70 Conn. 429; 39 Atl. 853; *Peabody v. North*, 161 Mass. 525; 37 N. E. 744.

³ Such as book accounts against third persons. *Taylor v. Foster*, 132 Mass. 30.

⁴ *Engel v. Brown*, 69 N. H. 183; 45 Atl. 402; *Young v. Alford*, 118 N. C. 215; 23 S. E. 973; *Rowell v. Lewis*, 72 Vt. 163; 47 Atl. 783.

⁵ *Lawrence v. Harrington*, 122 N. Y. 408; 25 N. E. 406.

⁶ *Wienberger v. Weidman*, 134 Cal. 599; 66 Pac. 869.

⁷ *Erpelding v. Ludwig*, 39 Minn. 518; 40 N. W. 829.

limitations.⁸ Thus A released a debt due from B in consideration of a contract by B to pay A an annuity for life. Subsequently A sued to recover the debt. It was held that payments of the annuity not being intended as credits on the original debt, would not prevent the operation of the statute of limitations.⁹ The debtor entered into an agreement with the creditor for the discontinuance of a suit upon a note, and subsequently, in pursuance of such agreement, paid the amount which he had agreed to pay to procure such discontinuance. The act of the creditor in subsequently crediting such payment as made upon the note without the consent of the debtor cannot remove the bar of the statute.¹⁰

§1689. Payment must be voluntary.

In order to operate as a waiver of the bar of the statute of limitations the payment made must be a voluntary one.¹ A payment made by a debtor to redeem property sold on execution does not revive the original debt.² The fact that the voluntary payment is the legal result of a prior voluntary act of the debtor does not make such payment operate as a waiver of the bar of the statute. Thus a payment of a dividend on the debts of a corporation by a committee of its creditors to whom its property had been assigned for the benefit of all

⁸ *Richardson v. Chanslor's Trustee*, 103 Ky. 425; 45 S. W. 774; *Ramsay v. Warner*, 97 Mass. 8; *Brown v. Latham*, 58 N. H. 30; 42 Am. Rep. 568; *Crow v. Gleason*, 141 N. Y. 489; 36 N. E. 497; *Rosenrance v. Johnson*, 191 Pa. St. 520; 43 Atl. 360; *Lyle v. Esser*, 98 Wis. 234; 73 N. W. 1008.

⁹ *Price's Administratrix v. Price's Administratrix*, 111 Ky. 771; 66 S. W. 529.

¹⁰ *Terrill v. Deavitt*, 73 Vt. 188; 50 Atl. 801.

¹ *Thomas v. Brewer*, 55 Ia. 227; 7 N. W. 571; *Blair v. Lynch*,

105 N. Y. 636; 11 N. E. 947.

² *Hanna v. Kasson*, 26 Wash. 568; 67 Pac. 271. (In this case the original debt was secured by mortgage. Judgment was taken upon the mortgage notes, execution issued thereon, premises of the mortgagor were sold under such execution, and subsequently the grantee of the property redeemed a portion thereof from the execution sale. This was held not to revive the original debt so as to prevent limitations from running against the original mortgage.)

the creditors does not waive the bar of the statute.³ So the payment of a dividend by a trustee or assignee for the benefit of creditors does not prevent limitations from running.⁴ A trustee under a deed of trust, given by way of mortgage, sold the trust property and applied the proceeds thereof in payment of debts secured by such trust deed. Such payment did not prevent the operation of the statute of limitations.⁵ So the statute of limitations is not waived by the act of the grantee in possession under a deed which in equity was treated as a mortgage, who receives the rents and profits of the land and applies them to the payment of his debt,⁶ nor by the act of the holder of the note in selling collateral, transferred to him when the loan was made, and applying the proceeds thereof upon such notes,⁷ nor by the act of the holder of a note secured by a chattel mortgage, which was given contemporaneously with the note, who subsequently sells the mortgaged property under a power of sale in such mortgage and applies the proceeds thereof to the mortgage debt.⁸ Most of the cases discussed in this section can be explained also on the theory that the payment in question was made neither by the debtor nor by his authorized agent.⁹ In some cases, however, it has been held that even where the security was given contemporaneously with the creation of the debt, the creditor is so far the agent

³ *Kilton v. Tool Co.*, 22 R. I. 605; 48 Atl. 1039. See *contra*, *Peabody v. Tenney*, 18 R. I. 498; 30 Atl. 456.

⁴ *Richardson v. Thomas*, 13 Gray (Mass.) 381; 74 Am. Dec. 636; *Stoddard v. Doane*, 7 Gray (Mass.) 387; *Roscoe v. Hale*, 7 Gray (Mass.) 274; *Pickett v. Leonard*, 34 N. Y. 175; *Battle v. Battle*, 116 N. C. 161; 21 S. E. 177; *Marienthal v. Mosler*, 16 O. S. 566; *Read v. Johnson*, 1 R. I. 81.

⁵ *Moffitt v. Carr*, 48 Neb. 403; 58 Am. St. Rep. 696; 67 N. W. 150.

⁶ *Adams v. Holden*, 111 Ia. 54; 82 N. W. 468; *Wolford v. Cook*, 71

Minn. 77; 70 Am. St. Rep. 315; 73 N. W. 706.

⁷ *National State Bank v. Rowland*, 1 Colo. App. 468; 29 Pac. 465; *Wolford v. Cook*, 71 Minn. 77; 70 Am. St. Rep. 315; 73 N. W. 706; *Brown v. Latham*, 58 N. H. 30; 42 Am. Rep. 568; *Acker v. Acker*, 81 N. Y. 143. See to the same effect, *Smith v. Ryan*, 66 N. Y. 352; 23 Am. Rep. 60; *Gibson v. Loundes*, 28 S. C. 285; 5 S. E. 727.

⁸ *Westinghouse Co. v. Boyle*, 126 Mich. 677; 86 Am. St. Rep. 570; 86 N. W. 136.

⁹ See § 1692.

of the debtor for the purpose of selling the collateral security and applying the proceeds on the debt, that such application is equivalent to a voluntary payment.¹⁰

§1690. Effect of application of payment by debtor.

If the debtor directs the application of the payments, the effect of such payment upon the bar of the statute depends on whether such payment is to be applied in whole or in part to the debt in question. If two separate notes are given by the debtor to the same creditor, secured by the same mortgage, the payment of one of such notes does not toll the statute of limitations as to the other note or as to the mortgage.¹ Where, however, two notes were written upon the same sheet of paper, and payments were made generally upon the two, the debtor not making separate applications of them, and the creditor noting the payments upon the back of the paper on which the notes were written without applying them to either note specifically, such payments operate to prevent both notes from being barred by limitations.² If the debtor owes several distinct notes on separate pieces of paper and he makes a payment to be applied generally upon all the notes,³ as where he directs his creditor, referring to a credit in the debtor's favor to "Let it go on the notes,"⁴ or directs a payment to be applied to pay the notes as far as it would go,⁵ such payment starts limitations anew upon all the notes. A continuing account which amounts in law to a single legal demand will be revived as a whole by a payment made to be credited thereon generally.⁶ So payment upon an entire account if made before limitations has run against it, starts limitations to running afresh, and

¹⁰ Taylor v. Foster, 132 Mass. 30; Sornberger v. Lee, 14 Neb. 193; 45 Am. Rep. 106; 15 N. W. 345.

¹ McManaman v. Hinchley, 82 Minn. 296; 84 N. W. 1018.

² Brafford v. Reed, 125 N. C. 311; 34 S. E. 443. As where the payments were indorsed on the "within notes." Sanborn v. Cole, 63 Vt.

590; 14 L. R. A. 208; 22 Atl. 716.

³ Rowell v. Lewis's Estate, 72 Vt. 163; 47 Atl. 783.

⁴ Young v. Alford, 118 N. C. 215; 23 S. E. 973.

⁵ Taylor v. Foster, 132 Mass. 30.

⁶ Friend v. Young (1897), 2 Ch. 421.

no part thereof is barred until the statutory period from the date of such payment has elapsed.⁷ If, however, distinct debts exist between the parties, payment of one debt does not extend the period of limitations as to other debts.⁸

§1691. Effect of application of payments by creditor.

We have seen elsewhere that if a debtor owes two or more debts to the same creditor, and makes a payment to the creditor without indicating upon which debt such payment is to be applied, the creditor has considerable latitude in applying such payment, and may even apply the payment to a debt which is barred by the statute of limitations. The question then presented is whether such payment operates to revive the debt already barred by the statute. Upon this there is a conflict of authority. The weight of authority and the better reasoning is that such application does not operate to revive a debt already barred;¹ but a strong minority of the courts held that such an application revives a debt which has been barred.² In some states it is held that while the creditor cannot apply payments as he pleases so as to revive debts once barred by the statute of limitations, he can apply payments made before the statute has run so as to start the statute to running anew.³ In other states it is held that the application

⁷ *McKeon v. Byington*, 70 Conn. 429; 39 Atl. 853; *Gum v. Richert*, 9 Kan. App. 570; 58 Pac. 236; *Stancell v. Burgwyn*, 124 N. C. 69; 32 S. E. 378; *Bellingham Bay Improvement Co. v. Ry.*, 17 Wash. 371; 49 Pac. 514; *Hay v. Peterson*, 6 Wyo. 419; 34 L. R. A. 581; 45 Pac. 1073.

⁸ *Harris v. Howard's Estate*, 56 4t. 695.

¹ *Mahoney v. McSweeney*, 31 N. B. 672; *Becker v. Oliver*, 111 Fed. 672; 49 C. C. A. 533; *Armistead v. Brooke*, 18 Ark. 521; *Blake v. Sawyer*, 83 Me. 129; 23 Am. St. Rep. 762; 12 L. R. A. 712; 21 Atl. 834;

Ramsay v. Warner, 97 Mass. 8; *Pond v. Williams*, 1 Gray 630; *Reeves v. Sawyer*, 88 Minn. 218; 92 N. W. 962.

² *Hopper v. Hopper*, 61 S. C. 124; 89 S. E. 366; *McDowell v. McDowell*, 75 Vt. 401; 98 Am. St. Rep. 831; 56 Atl. 98; *Rowell v. Lewis's Estate*, 72 Vt. 163; 47 Atl. 783; *Sanborn v. Cole*, 63 Vt. 590; 14 L. R. A. 208; 22 Atl. 716.

³ *Blake v. Sawyer*, 83 Me. 129; 23 Am. St. Rep. 762; 12 L. R. A. 712; 21 Atl. 834; *Beck v. Hass*, 111 Mo. 264; 33 Am. St. Rep. 516; 20 S. W. 19.

by the creditor to specific debts not yet barred does not start limitations to running anew.⁴ If the creditor has made no application of a debt due from him to his debtor upon the debt in dispute due from his debtor to him, the existence of such debt clearly does not extend limitations. The mere existence of an indebtedness in favor of A as against B is not a payment on a note held by B against A, though it may be used as a set-off.⁵

§1692. By whom part payment may be made.

Since part payment extends the period of limitations only when it amounts to an admission by the debtor that more is due, it follows that a payment cannot have this effect unless it is in some way authorized by the debtor. The act of the creditor in making a credit upon the debt without the assent of the debtor¹ cannot prevent the running of the statute; nor does the payment of the debt by a person having no authority to make such payment prevent limitations from running.² To operate as a waiver of the bar of the statute a part payment must be made by the debtor³ or by his agent duly authorized.⁴ The agent must be authorized not only to make the payment which he makes, but to make it when he makes it in order to waive the bar of the statute as to the principal. Thus a debtor delivered money to an agent with orders to pay the creditor. The agent held the money a year and a half, and then made the payment. Such payment did not prevent the running of the statute.⁵ However, conduct of an agent appointed when the debt was incurred may serve to bind the principal in such cases. A borrowed money from B, gave collateral for the loan and gave X a power of attorney to sell such collateral and

⁴ Lyle v. Esser, 98 Wis. 234; 73 327; Dundee, etc., Co. v. Horner, N. W. 1008. 30 Or. 558; 48 Pac. 175.

⁵ Nash v. Woodward, 62 S. C. 418; 40 S. E. 895. ³ Good v. Ehrlich, 67 Kan. 94; 72 Pac. 545; Mizer v. Emigh, 63 Neb. 245; 88 N. W. 479.

¹ Bay City Iron Co. v. Emery, 128 Mich. 506; 87 N. W. 652. ⁴ Cone v. Hyatt, 132 N. C. 810; 44 S. E. 678.

² Cropley v. Eyster, 9 App. D. C. 373; Patterson v. Collier, 113 Mich. 12; 67 Am. St. Rep. 440; 71 N. W. 67 N. W. 535. ⁵ Sweet v. Ellis, 109 Mich. 460;

apply the proceeds on the note. Subsequently X did so. This was held to be a part payment which removed the bar of the statute.⁶ However, payment made by a third person, under some contract between himself and the debtor, is sufficient, even if such third person is not a general agent of the debtor.⁷ A payment made by one acting without authority from the debtor may be ratified by the debtor, and if so ratified will operate as a waiver of the bar of the statute, if it would have had such effect had it been made by the debtor himself.⁸ The daughter of a debtor made a payment without his knowledge or consent. Subsequently a statement of the account was exhibited to the debtor, and he approved it as correct. This was held to be a ratification of such payment, and accordingly it had the same effect in preventing the statute of limitations from running as it would have had if made by the debtor himself.⁹ In order to have the debtor bind himself by ratification of the payment, such payment must have been made on his behalf. A promise made by one of two joint and several debtors to pay the residue of the debt left after the other debtor had made a part payment thereon of his own behalf does not amount to a ratification of such payment. Hence if the new promise is unenforceable because it does not comply with the statutory requirements, the debtor who did not make such payment is not liable.¹⁰

§1693. Payment by partnership.

Before dissolution a payment made by a partner upon a partnership debt starts limitations to running afresh.¹ This doctrine is qualified in some jurisdictions by the rule that if such payment is made out of the personal funds of the partner it does not stop limitations from running against the partner-

⁶ *National State Bank v. Rowland*, 1 Colo. App. 468; 29 Pac. 465.

⁷ *Huntington v. Chesmore*, 60 Vt. 566; 15 Atl. 173.

⁸ *Clarkin v. Brown*, 80 Minn. 361; 83 N. W. 351.

⁹ *Clarkin v. Brown*, 80 Minn. 361; 83 N. W. 351.

¹⁰ *Pfenninger v. Kokesch*, 68 Minn. 81; 70 N. W. 867.

¹ *Harding v. Butler*, 156 Mass. 34; 30 N. E. 168.

ship.² A payment made by a member of a partnership after the dissolution thereof is held by some authorities to operate as a waiver of the bar of the statute as to such payees as did not know of the dissolution.³ If the creditor has notice of the dissolution, a part payment made by the liquidating partner does not waive the bar as to the other partners,⁴ even under a statute providing that on dissolution each partner may with consent of his creditor settle for his own share of the firm debts.⁵ Some authorities hold that even if the creditor knows of the dissolution a payment by the partners who remain in the business prevents limitations from running as to all.⁶

§1694. Payment by co-debtor.

A payment by one of two or more co-debtors is not, according to the weight of authority, a waiver of the bar as to the other debtors;¹ nor will such a payment if made before the statute has run prevent the running of the statute as to any but the debtor making the payment.² Some authorities hold, however, that a payment by one of two or more joint debtors, if made

² *Blethen v. Murch*, 80 Me. 313; 14 Atl. 208.

³ *In re Tucker* (1894), 1 Ch. 724; *Davison v. Sherburne*, 57 Minn. 355; 47 Am. St. Rep. 618; 59 N. W. 316; *Clement v. Clement*, 69 Wis. 599; 2 Am. St. Rep. 760; 35 N. W. 17.

⁴ *Kerper v. Wood*, 48 O. S. 613; 15 L. R. A. 656; 29 N. E. 501.

⁵ *Turner v. Ross*, 1 R. I. 88.

⁶ *Campbell v. Floyd*, 153 Pa. St. 84; 25 Atl. 1033.

¹ *State Loan & Trust Co. v. Cochran*, 130 Cal. 245; 62 Pac. 466, 600; *Bottles v. Miller*, 112 Ind. 584; 14 N. E. 728; *Smith v. Caldwell*, 15 Rich. L. (S. C.) 365; *Gowdy v. Gillam*, 6 Rich. L. (S. C.) 28.

² *Atkins v. Tredgold*, 2 Barn. & C. 23; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Clementson v. Williams*, 8 Cranch (U. S.) 72; *Underwood v.*

Patrick, 94 Fed. 468; 36 C. C. A. 330; *Boynton v. Spafford*, 162 Ill. 113; 53 Am. St. Rep. 274; 44 N. E. 379; *Koontz v. Hammond*, 21 Ind. App. 76; 51 N. E. 506; *Wellington National Bank v. Thomson*, 9 Kan. App. 667; 59 Pac. 178; *Tate v. Hawkins*, 81 Ky. 577; 50 Am. Rep. 181; *Quimby v. Putnam*, 28 Me. 419; *Rogers v. Anderson*, 40 Mich. 290; *Willoughby v. Irish*, 35 Minn. 63; 59 Am. Rep. 297; 27 N. W. 379; *First National Bank v. Bullard*, 20 Mont. 118; 49 Pac. 658; *Mayberry v. Willoughby*, 5 Neb. 368; 25 Am. Rep. 491; *Parker v. Butterworth*, 46 N. J. Law 244; 50 Am. Rep. 407; *Littlefield v. Littlefield*, 91 N. Y. 203; 43 Am. Rep. 663; *Grovenor v. Signor*, 10 N. D. 503; 88 N. W. 278; *Hanna v. Kasson*, 26 Wash. 568; 67 Pac. 271;

before the cause of action is barred, starts limitations anew as to all the debtors.³

§1695. Payment by principal debtor.

A part payment upon a debt made by the principal debtor does not, according to the weight of authority, prevent the running of the statute in favor of a surety;¹ nor does it waive the bar of the statute after it has once run.² Certain stockholders of a corporation executed an accommodation note to obtain a loan for the corporation which was not a party to the note. Subsequently the corporation made payments upon such note. These payments were held not to waive the bar of the statute.³ The fact that the surety at the request of the creditor writes to the principal a letter urging him to pay the debt, does not make the surety a party to a payment made in consequence thereof by the maker, and such payment does not operate to prevent the statute from running in favor of the surety.⁴ This principle has been applied by some authorities to a case where a husband has made a payment upon a debt secured by a mortgage executed jointly by himself and his wife, encumbering her property,⁵ or community property,⁶ or which is secured by a vendor's lien upon land belonging to her.⁷ Such

Stubblefield v. McAuliff, 20 Wash. 442; 55 Pac. 637; *Bank v. Cotton*, 53 Wis. 31; 9 N. W. 926; *Cowhick v. Shingle*, 5 Wyom. 87; 63 Am. St. Rep. 17; 25 L. R. A. 608; 37 Pac. 689.

³ *Sigourney v. Drury*, 14 Pick. (Mass.) 387; *Moore v. Beaman*, 111 N. C. 328; 16 S. E. 177; *Moore v. Goodwin*, 109 N. C. 218; 13 S. E. 772; *Partlow v. Singer*, 2 Or. 307; *Silman v. Silman*, 2 Hill (S. C.) 416.

¹ *Hunter v. Robertson*, 30 Ga. 479; *Mozingo v. Ross*, 150 Ind. 688; 65 Am. St. Rep. 387; 41 L. R. A. 612; 50 N. E. 867; *Meitzler v. Todd*, 12 Ind. App. 381; 54 Am. St. Rep. 531; 39 N. E. 1046; *Steele v. Soud-*

er, 20 Kan. 39; *Winchell v. Hicks*, 18 N. Y. 558; *Shoemaker v. Benedict*, 11 N. Y. 176; 62 Am. Dec. 95; *Hance v. Hair*, 25 O. S. 349.

² *Kallenbach v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47; *Davis v. Mann*, 43 Ill. App. 301.

³ *Patterson v. Collier*, 113 Mich. 12; 67 Am. St. Rep. 440; 71 N. W. 327.

⁴ *Borden v. Fletcher's Estate*, 131 Mich. 220; 91 N. W. 145.

⁵ *Curtiss v. Perry*, 126 Mich. 600; 85 N. W. 1131.

⁶ *Stubblefield v. McAuliff*, 20 Wash. 442; 55 Pac. 637.

⁷ *Poindexter v. Rawlings*, 106 Tenn. 97; 82 Am. St. Rep. 869; 59 S. W. 766.

payments have been held not to waive the bar of the statute as to her. Even where payment by the principal does not extend limitations as to a surety the surety may be bound if he authorizes such payment. Thus A was principal and B, C and D his sureties. The creditor called on B and C for payment, and they asked him to see A. A made a payment as the result of the creditors' application to him. Such payment was held to extend the time of limitations as to B and C, but not as to D.⁸ Some authorities hold, on the other hand, that payments made by the principal prevent the statute of limitations from running in favor of the surety.⁹ This principle has been applied where such payments were made before the cause of action was barred.¹⁰ Thus under this principle, where a husband and wife executed a mortgage on their homestead, and the husband made payments upon such debt, such payments have been held to prevent the running of the statute as to the wife.¹¹ So where the mortgage covers her separate property a payment by the husband on his debt has been held to prevent limitations from running against the mortgage.¹² In jurisdictions where a payment by the principal prevents limitations from running in favor of the surety and an indorser is treated as a surety, the question is presented, whether payments by the maker of the note can prevent the statute of limitations from running in favor of the indorser. On this question there is a divergence of authority.¹³ Payments made

⁸ *Winchell v. Hicks*, 18 N. Y. 558.

⁹ *Moore v. Carr*, 123 N. C. 425; 31 S. E. 832; *Woonsocket Institution v. Ballou*, 16 R. I. 351; 1 L. R. A. 555; 16 Atl. 144; *Dickson v. Gourdin*, 29 S. C. 343; 1 L. R. A. 628; 7 S. E. 510.

¹⁰ *Burleigh v. Stott*, 8 B. & C. 36; *Moore v. Goodwin*, 109 N. C. 218; 13 S. E. 772.

¹¹ *Skinner v. Moore*, 64 Kan. 360; 91 Am. St. Rep. 244; 67 Pac. 827; *Clift v. Williams*, 105 Ky. 559; 51 S. W. 821; 49 S. W. 328; *Roberts*

v. Roberts, 10 N. D. 531; 88 N. W. 289.

¹² *Cross v. Allen*, 141 U. S. 528. (Payments made after the death of the wife were held to have this effect against her heirs.)

¹³ That the bar is not waived as to the indorser. *Maddox v. Duncan*, 143 Mo. 613; 65 Am. St. Rep. 678; 41 L. R. A. 581; 45 S. W. 688. That the bar is waived as to the indorser. *Hooper v. Hooper*, 81 Md. 155; 48 Am. St. Rep. 496; 31 Atl. 508; *Garrett v. Reeves*, 125 N. C. 529; 34 S. E. 636.

by a surety, as upon an official bond,¹⁴ have been held to prevent limitations from running in favor of the maker.

§1696. Payment by mortgagor or grantee of mortgaged realty.

If A buys mortgaged realty from the mortgagor B, payments made by A upon the mortgage debt will prevent limitations from operating as a bar to the foreclosure of the mortgage,¹ whether A has² or has not³ assumed and agreed to pay the mortgage debt. Whether payments made under such circumstances by A will prevent limitations from running against B's personal liability is a different question. The weight of authority is that payments made by A have no effect upon the running of the statute against B's liability on the debt,⁴ even if A has assumed and agreed to pay the mortgage debt.⁵ Some authorities hold, however, that if A has covenanted to pay the mortgage debt, payments by A will keep the mortgage debt alive as to B, the original debtor.⁶ If the mortgage debt has become barred by limitations, B, the original mortgagor, cannot revive the lien of the mortgage as against A, his grantee, by making a payment upon the mortgage debt after such conveyance.⁷ So where mortgaged premises are sold under execution on a judgment against the mortgagor, a part payment made by the mortgagor upon the mortgage debt will not stop the running of the statute of limitations against the mortgage in favor of the purchaser at such execution sale.⁸ Payment upon a mortgage debt, made by the grantee of part of the prem-

¹⁴ *State v. Finn*, 98 Mo. 532; 14 Am. St. Rep. 654; 11 S. W. 994.

¹ *Colton v. Depew*, 60 N. J. Eq. 454; 83 Am. St. Rep. 650; 46 Atl. 728.

² *Murray v. Emery*, 187 Ill. 408; 58 N. E. 327; *Harts v. Emery*, 184 Ill. 560; 56 N. E. 865.

³ *McLane v. Allison*, 60 Kan. 441; 56 Pac. 747.

⁴ *Trustees of the Alms House Farm v. Smith*, 52 Conn. 434; *Home Life Ins. Co. v. Elwell*, 111 Mich. 689; 70 N. W. 334.

⁵ *Cottrell v. Shepherd*, 86 Wis. 649; 39 Am. St. Rep. 919; 57 N. W. 983.

⁶ *Biddle v. Pugh*, 59 N. J. Eq. 480; 45 Atl. 626.

⁷ *Day v. Baldwin*, 34 Ia. 380; *Schumacker v. Sibert*, 18 Kan. 104; 26 Am. Rep. 765; *Mack v. Anderson*, 165 N. Y. 529; 59 N. E. 289; *Damon v. Leque*, 17 Wash. 573; 61 Am. St. Rep. 927; 50 Pac. 485.

⁸ *Raymond v. Bales*, 26 Wash. 493; 67 Pac. 269.

ises to protect his interest, does not waive the bar of the statute as to the owners of the residue of the premises;⁹ nor does such payment waive the bar of the statute as to the grantee of part of the premises if made by a grantee of the rest of the premises who has covenanted to pay the mortgage debt.¹⁰ If the mortgage debt is not barred when the mortgagor conveys the premises, payments thereon made by the mortgagor after the conveyance do not start limitations to running afresh as to the lien of the mortgage.¹¹ As to the lien of the mortgage, limitations runs from the date of the last payment made by the mortgagor before he conveys the realty.¹² Under some authorities which treat lapse of time in enforcing a mortgage as merely raising a presumption of payment, payment by anyone interested in either the debt or the equity of redemption is sufficient to rebut the presumption of payment. Thus payment by the mortgagor after he has conveyed the mortgaged premises to another is sufficient to rebut such presumption as in favor of his grantee,¹³ and payment by one interested in the equity of redemption repels such presumption as to others interested therein.¹⁴

§1697. Payment by other persons.

Payment made by an administrator after decedent's death has been held to waive the bar of the statute of limitations,¹ at least where the widow and heirs acquiesce in such payments

⁹ *Murdock v. Waterman*, 145 N. Y. 55; 27 L. R. A. 418; 39 N. E. 829. *Contra*, *Longstreet v. Brown* (N. J. Eq.), 37 Atl. 56.

¹⁰ *Mack v. Anderson*, 165 N. Y. 529; 59 N. E. 289.

¹¹ *Cook v. Trust Co.*, 106 Ky. 803; *sub nomine*, *Cook v. Bramel*, 45 L. R. A. 212; 51 S. W. 600. *Contra*, see obiter in *Mack v. Anderson*, 165 N. Y. 529; 59 N. E. 289.

¹² *Cook v. Trust Co.*, 106 Ky. 803; *sub nomine*, *Cook v. Bramel*, 45 L. R. A. 212; 51 S. W. 600.

¹³ *Kendall v. Tracy*, 64 Vt. 522; 24 Atl. 1118. However in *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, which is often cited on this point, it does not appear from the opinion whether the payment involved was made before or after the conveyance by the mortgagor.

¹⁴ *Longstreet v. Brown* (N. J. Eq.), 37 Atl. 56; *Hollister v. York*, 59 Vt. 1; 9 Atl. 2.

¹ *Waughop v. Bartlett*, 165 Ill. 124; 46 N. E. 197; *Slattery v. Doyle*, 180 Mass. 27; 61 N. E. 264.

upon a debt, secured by mortgage, upon realty in which they are interested, some of the heirs being minors.² This power clearly exists where limitations has not run at the death of the decedent.³ It has been held, however, that payment by personal representatives is of no more effect than a new promise by them, and that accordingly such payment, whether it makes an executor liable personally or not, does not bind the decedent's estate.⁴ Under a special statute a payment made upon a claim which has not been authenticated as required by statute does not operate to prevent the running of the statute of limitations thereon.⁵ A receiver, appointed under a mortgage which authorizes the mortgagee to appoint a receiver with power to manage and carry on the business as he may think fit, has been held to have authority to make part payments on an unsecured business debt to waive limitations in favor of the mortgagor.⁶ Whether payment by a widow upon a debt of her husband's made to protect her homestead and dower interest in his realty waives the bar of the statute against his estate generally, is a question upon which there is a conflict of authority.⁷ Payment by a corporation does not renew a cause of action against its stockholders,⁸ or against its directors on their statutory liability because they declared a dividend while the corporation was insolvent,⁹ or against the directors because of their failure to file the report required by statute.¹⁰

§1698. Effect of indorsement of part payment.

If an indorsement of a payment upon a debt is made by the

² *Hemphill v. Pry*, 183 Pa. St. 593; 38 Atl. 1020.

³ *Foster v. Starkey*, 12 Cush. (Mass.) 324; *McLaren v. McMartin*, 36 N. Y. 88.

⁴ *In re Claghorn's Estate*, 181 Pa. St. 608; 37 Atl. 921.

⁵ *Cox v. Phelps*, 65 Ark. 1; 45 S. W. 990.

⁶ *In re Hale* (1899), 2 Ch. 107.

⁷ That such payment waives the bar generally. *Perry v. Horack*, 63

Kan. 88; 88 Am. St. Rep. 225; 64 Pac. 990. That such payment does not waive the bar. *Ætna Life Ins. Co. v. McNeely*, 166 Ill. 540; 46 N. E. 1130; affirming, 65 Ill. App. 222.

⁸ *Close v. Potter*, 155 N. Y. 145; 49 N. E. 686.

⁹ *Patterson v. Thompson*, 86 Fed. 85.

¹⁰ *Chapman v. Lynch*, 156 N. Y. 551; 51 N. E. 275.

debtor,¹ or by his agent,² or by the creditor with the consent of the debtor,³ such indorsement is clearly sufficient to show that such payment has been made and that the statute of limitations does not operate. If the indorsement is made by the creditor and he seeks to use such indorsement to prevent the statute of limitations from operating, the question of the effect of such indorsement then depends upon the circumstances under which it was made. Indorsement by the creditor of a payment on a debt is, if made a considerable time before the debt is barred by statute, an admission against his own interest, and hence is admissible in evidence to prove such payment for the purpose of extending the period of limitations.⁴ If made after the statute has run⁵ or shortly before the statutory period has elapsed, it is in favor of the creditor and not against his interest, and hence not admissible in evidence if the fact of payment is not otherwise shown. Since the date determines the admissibility of the entry, the entry is not proof of its own date.⁶ In any event an indorsement is not competent evidence as to a fact not within the personal knowledge of the party making it. Thus if the payment is actually made by a third person the indorsement is incompetent to show that the money was in fact furnished by the maker.⁷ If the fact of payment is otherwise shown, the indorsement of the credit by the creditor may be considered as evidence.⁸

¹ *Gay v. Hassom*, 64 Vt. 495; 24 Atl. 715.

² *Foster v. Cochran*, 89 Ga. 466; 15 S. E. 551.

³ *Less v. Arndt*, 68 Ark. 399; 59 S. W. 763; *Sibley v. Phelps*, 6 Cush. (Mass.) 172.

⁴ *Mills v. Davis*, 113 N. Y. 243; 3 L. R. A. 394; 21 N. E. 68.

⁵ *Wellman v. Miner*, 179 Ill. 326; 53 N. E. 609; *Easter v. Easter*, 44 Kan. 151; 24 Pac. 57; *Mills v. Davis*, 113 N. Y. 243; 3 L. R. A. 394; 21 N. E. 68; *Roseboom v. Billington*, 17 Johns. 182; *Bond v. Wilson*, 129 N. C. 387; 40 S. E. 182.

So by statute even if made before limitations have run. *Fowles v. Joslyn*, 130 Mich. 272; 89 N. W. 946; *Christopher v. Wilkins*, 64 N. J. Eq. 354; 51 Atl. 728. *Contra*, even after debt is barred, *McDowell v. McDowell*, 75 Vt. 401; 98 Am. St. Rep. 831; 56 Atl. 98.

⁶ *Biscoe v. Huff*, 75 Mo. App. 288; *Smith v. Wells*, 70 N. H. 49; 46 Atl. 51.

⁷ *Arbuckle v. Templeton*, 65 Vt. 205; 25 Atl. 1095.

⁸ *Wellman v. Miner*, 179 Ill. 326; 53 N. E. 609.

§1699. To whom payment may be made.

If the debtor makes a payment to the assignee of the debt, after the assignment, and with knowledge of it, such payment waives the bar of the statute.¹ If, however, the debtor makes a payment after the assignment and without knowledge thereof, to the assignor, such payment does not waive the bar of the statute.²

VIII. STATUTORY PROVISIONS AS TO FORM OF NEW PROMISE OR ACKNOWLEDGMENT.

§1700. General effect.

At Common Law there were no specific requirements as to the outward form of a new promise or acknowledgment. If the new promise or acknowledgment possessed the requisite essential elements, it was sufficient, even though made orally. The feeling that on the one hand a chance was given for fraud and perjury, and on the other that the courts were beginning to ignore the plain requirements of the statute by treating many cases as exceptions to the statute, which were in fact within its plain terms, led to the passage in England of a statute known as Lord Tenterden's act.¹ This statute has, with some modifications, been copied in many states of our Union. Under such statutes the new promise or acknowledgment must be in writing, in order to waive the bar of the statute, or to extend the period for which the statute was to run. Many of the statutes further provide that such promise or acknowledgment must be signed by the party to be charged therewith. Under such statute an oral promise or acknowledgment has no valid-

¹ *McBrayer v. Mills*, 62 S. C. 36; 39 S. E. 788.

² *Investment Securities Co. v. Berghold*, 60 Kan. 813; 58 Pac. 469.

¹ 9 Geo. IV., C. 14, § 1. "Courts, by their decisions as to the effect of loose and unsatisfactory oral admissions and new promises, had almost

frittered away the statute of limitations, and to remedy this, statutes similar to the one in force in this state have been quite generally enacted." *Barlow v. Barner*, 1 Dill. (U. S.) 418, 419; quoted in *Fort Scott v. Hickman*, 112 U. S. 150, 164.

ity.² So an oral promise cannot be considered in connection with a writing which fails to show an express promise, to supplement the deficiencies of the writing.³ Since an express oral contract is invalid, an estoppel *in pais* is without effect as against such statutory provision.⁴ Under a statute providing that a mortgage can be renewed or extended only by a writing executed with the formalities of a deed, a written acknowledgment of the debt not executed with the formalities of a deed is insufficient to extend the lien of a mortgage⁵ or of a deed of trust.⁶ So a note which recites that it "shall be held good on or by the same mortgage that was given" to secure an earlier note does not renew or extend the original mortgage.⁷ Under a statute requiring a new promise to be in writing, a new promise which refers to a specific debt is sufficient even if extrinsic evidence is necessary to identify the debt.⁸ So it is admissible to show under a promise to "attend to yours in a short time," referring to a debt, that only one debt was owing or claimed to be due between the parties.⁹ Such a statute applies to debts which were created before the passage of such a statute,¹⁰ but it does not apply to oral promises made before the passage of the statute,¹¹ nor to the extension of a mortgage by renewal of the debt made before the statute was passed,¹² nor

² Morehouse v. Morehouse (Cal.), 69 Pac. 625; Hughes v. Treadway, 116 Ga. 663; 42 S. E. 1035; Adams v. Mills, 49 La. Ann. 775; 22 So. 257; King v. Davis, 168 Mass. 133; 46 N. E. 418; Shapley v. Abbott, 42 N. Y. 443; 1 Am. Rep. 548; Whitehill v. Lowe, 10 Utah 419; 37 Pac. 589.

³ Johnston v. Hussey, 92 Me. 92; 42 Atl. 312.

⁴ Shapley v. Abbott, 42 N. Y. 443; 1 Am. Rep. 548.

⁵ Moulton v. Williams, 6 Ida. 424; 55 Pac. 1019.

⁶ Union, etc., Bank v. Smith, 107 Tenn. 476; 64 S. W. 756.

⁷ Randolph v. Thomas, 107 Tenn. 132; 64 S. W. 5.

⁸ First National Bank v. Woodman, 93 Ia. 668; 57 Am. St. Rep. 287; 62 N. W. 28; Miller v. Beardsley, 81 Ia. 720; 45 N. W. 756; Stout v. Marshall, 75 Ia. 498; 39 N. W. 808; Russell v. Davis, 51 Minn. 482; 53 N. W. 766; Hill v. Hill, 51 S. C. 134; 28 S. E. 309.

⁹ Woodbridge v. Allen, 12 Met. (Mass.) 470.

¹⁰ Esselstyn v. Weeks, 12 N. Y. 635.

¹¹ Vinson v. Palmer, — Fla. —; 34 So. 276.

¹² Wilson v. Pickering, 28 Mont. 435; 72 Pac. 821.

where the statute applies to part payments does it apply to part payments made before the statute was passed.¹³ Such a statute does not apply to a promise upon a new and distinct consideration to pay a debt barred by limitations.¹⁴

§1701. Form requisite by statute.

If the statute requires the new promise or acknowledgment to be in writing and signed by the party to be charged therewith, a signature is sufficient if made by the debtor himself or by his authorized agent.¹ Thus where the debtor dictated a letter to his stenographer, and it was typewritten by the latter, and signed by the latter with the name of the debtor by means of a rubber stamp, such acknowledgment was held to comply with the statute.² A promise need not indicate the official character of the promisee. Thus a letter sent by the debtor to one of the two administrators of the estate of the creditor, not describing him by his official capacity, is sufficient.³ Letters signed by the debtor may be a sufficient acknowledgment or new promise.⁴ The assumption of a mortgage, and the agreement to pay the same made by the grantee of realty, is a sufficient new promise in writing to start the statute of limitations from running afresh.⁵ The acquiescence of a debtor in an account presented to him by his creditor is not a sufficient compliance with the statute requiring an acknowledgment to be in writing and signed by the party to be charged.⁶ Writing the acknowledgment upon a statement of the account furnished

¹³ Fayetteville, etc., Association v. Bowlin, 63 Ark. 573; 39 S. W. 1046.

¹⁴ Graham v. Stanton, 177 Mass. 321; 58 N. E. 1023; Devine v. Murphy, 168 Mass. 249; 46 N. E. 1066.

¹ Liberman v. Gurensky, 27 Wash. 410; 67 Pac. 998.

² *In re* Deep River National Bank, 73 Conn. 341; 47 Atl. 675.

³ Hill v. Hill, 51 S. C. 134; 28 S. E. 309.

⁴ Concannon v. Smith, 134 Cal.

14; 66 Pac. 40; Miller v. Beardsley, 81 Ia. 720; 45 N. W. 756; Howard v. Windom, 86 Tex. 560; 26 S. W. 483.

⁵ Daniels v. Johnson, 129 Cal. 415; 79 Am. St. Rep. 123; 61 Pac. 1107.

⁶ Magarity v. Shipman, 93 Va. 64; 24 S. E. 466; Stiles v. Laurel Fork, etc., Coal Co., 47 W. Va. 838; 35 S. E. 986; Moore v. Blackman, 109 Wis. 528; 85 N. W. 429.

to the debtor,⁷ or acknowledging the liability in some form in a pleading filed in court,⁸ or acknowledging it by corporate action thereon, recognizing its validity, as where county commissioners,⁹ or a board of arbitration authorized by the constitution of a benefit society,¹⁰ recognize the liability as subsisting, has in each case been held sufficient. If the acknowledgment is made by a public corporation, however, the corporation is not bound unless the acknowledgment was made by its authorized agent. Thus where the secretary of a city published an annual statement of the official affairs of the city, and included therein certain bonds as valid obligations, such statement does not amount to an acknowledgment if the secretary was authorized not to bind the city by a new promise.¹¹ Levying taxes to create a sinking fund to meet interest which is due is not an acknowledgment of the validity of the bond.¹² If a town has no authority to vote money for bounties other than the original authority to the town to grant bounties, the vote of the town to pay a bounty claim to a drafted man which has been barred by limitations does not amount to an acknowledgment so as to waive the bar of the statute.¹³ So a default judgment in a foreclosure suit is not a compliance with the statute requiring the new promise to be in writing.¹⁴

§1702. Effect of statute upon part payment.

Lord Tenterden's act, and the American statutes which follow it most closely, do not include part payment, but refer solely to a new promise and to a new acknowledgment. Ac-

⁷ King v. Davis, 168 Mass. 133; 46 N. E. 418; Tennessee Brewing Co. v. Hendricks, 77 Miss. 491; 27 So. 526.

⁸ Kelley v. Graham, 70 Ark. 490; *sub nomine*, Raines v. Graham, 69 S. W. 551; Roberts v. Leak, 108 Ga. 806; 33 S. E. 995. Account of guardian. Blakeney v. Wyland, 115 Ia. 607; 89 N. W. 16.

⁹ Coffin v. Kearney County, 114 Fed. 518.

¹⁰ Dearborn v. Grand Lodge, 138 Cal. 658; 72 Pac. 154.

¹¹ Huston v. Jankowski, 76 Tex. 368; 18 Am. St. Rep. 57; 13 S. W. 269.

¹² Houston v. Jankowski, 76 Tex. 368; 18 Am. St. Rep. 57; 13 S. W. 269.

¹³ O'Connor v. Waterbury, 69 Conn. 206; 37 Atl. 499.

¹⁴ Boone v. Colehour, 165 Ill. 305; 46 N. E. 253.

cordingly part payment may be proved in accordance with the ordinary rules of evidence, without reference to the statutory requirements.¹ In some states the statute specifically provides that part payment is not included under such statute.² Other statutes, either by their express terms or by the necessary effect of their phraseology, require written evidence of a part payment.³ By some some statutes it must be either written and signed by the debtor or his agent, or if unsigned, must be in the handwriting of the debtor.⁴ Such statute, though referring to new promises, has been held to apply to payments, even if an oral promise is made therewith,⁵ or to an unsigned credit indorsed upon the note by the agent of the maker.⁶ Under such statute an entry of payment made by one partner upon a partnership note after limitations has run is, in legal effect, a new contract in writing to pay the entire amount.⁷ Under a statute providing that "if any payment or new promise to pay shall have been made in writing on any note within or after the statutory period," an action may be commenced thereon at any time within the statutory period from the time of such payment or promise to pay, the court has expressly refused to decide whether the promise must be in writing,⁸ holding in the particular case that indorsement by a payee of a payment conceded to have been made was a sufficient compliance with such statute, even if it included payment.

¹ *Gillingham v. Brown*, 178 Mass. 417; 55 L. R. A. 320; 60 N. E. 122; *Utica First National Bank v. Bal-lou*, 49 N. Y. 155.

² *Pond v. French*, 97 Me. 403; 54 Atl. 920; *Mills v. Davis*, 113 N. Y. 243; 3 L. R. A. 394; 21 N. E. 68; *Marshall v. Holmes*, 68 Wis. 555; 32 N. W. 685.

³ *Gray v. Pierson*, 7 Ida. 540; 64 Pac. 233; *Perry v. Ellis*, 62 Miss. 711.

⁴ *Black v. Holland*, 102 Ga. 523; 27 S. E. 671; *Watkins v. Harris*, 83 Ga. 680; 10 S. E. 447.

⁵ *Poole v. Trimble*, 102 Ga. 773; 29 S. E. 871.

⁶ *Moore v. Moore*, 103 Ga. 517; 30 S. E. 535.

⁷ *Powell v. Fraley*, 98 Ga. 370; 25 S. E. 450. (Hence under the parol evidence rule the partner cannot show an oral contract to release him on payment of one-half the amount of the debt.)

⁸ *Willett v. Maxwell*, 169 Ill. 540; 48 N. E. 473; affirming 68 Ill. App. 119.

IX. WHO CAN PLEAD LIMITATIONS.

§1703. Who can invoke limitations as a defense.

The defense of limitations is usually treated as one personal to the debtor.¹ Since it is personal to him, he may waive it if he sees fit to do so.² His waiver of such defense by a new promise, acknowledgment or part payment is discussed elsewhere.³ He may also waive such defense by failure to plead it in an action against him on the cause of action barred by the statute.⁴ Persons who represent and stand in the place of the person to whom the privilege of pleading limitations belongs may also plead the statute.⁵ An executor represents his decedent and may plead limitations on behalf of the estate.⁶ If an attempt is made under statutes authorizing the sale of realty to pay the debts of the decedent, to sell realty to pay debts barred by the statute of limitations, the heir to whom such realty has descended may interpose the defense of the statute.⁷ It has been held that the assignee of a claim may plead limitations against a set-off if his assignor could have pleaded it.⁸ Since the right to plead the statute is personal,

¹ *Sanger v. Nightingale*, 122 U. S. 176; *Corbey v. Rogers*, 152 Ind. 169; 52 N. E. 748; *In re Passmore*, 194 Pa. St. 632; 45 Atl. 417. "The right to plead the statute of limitations has always been held to be a personal privilege of which the debtor could avail himself or not, as he might choose." *Sanger v. Nightingale*, 122 U. S. 176, 183.

² *Clark v. Augustine*, 62 N. Y. Eq. 689; 51 Atl. 68.

³ See §§ 1673 *et seq.*; 1679 *et seq.*; 1687 *et seq.*

⁴ *Allen v. Smith*, 129 U. S. 465; *Parker v. Irvin*, 47 Ga. 405; *Anderson v. McNeal*, — Miss. —; 34 So. 1.

⁵ "The general rule is that the right to plead the statute of limitations is a personal privilege, but

persons standing in the place of the party having the personal privilege, such (as) grantees, mortgagees, executors, administrators, trustees, heirs, devisees, or other persons holding under him, may set up such a defense." *Corbey v. Rogers*, 152 Ind. 169, 171; 52 N. E. 748.

⁶ *Michetree v. Veach*, 31 Pa. St. 455.

⁷ *Steele v. Steele*, 64 Ala. 438; 38 Am. Rep. 15; *Riser v. Snoddy*, 7 Ind. 442; 65 Am. Dec. 740; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503; 20 Am. Dec. 716; *Smith v. Brown*, 99 N. C. 377; 6 S. E. 667; *Gilman v. Tisdale*, 1 Yerg. (Tenn.) 285.

⁸ *Walker v. Burgess*, 44 W. Va. 399; 67 Am. St. Rep. 775; 30 S. E. 99.

others cannot invoke it as a defense if the judgment debtor wishes to waive it.⁹ Thus a second mortgagee cannot compel his debtor to plead the statute of limitations as against a first mortgagee,¹⁰ and unsecured creditors cannot compel the debtor to set up limitations as a defense against other creditors whose claims are secured.¹¹ A judgment creditor having a second lien cannot compel the debtor to plead limitations against another judgment creditor who has a lien, prior, but barred by limitations,¹² and failure to plead the statute cannot be treated as fraudulent on the application of other judgment creditors.¹³ In foreclosure proceedings one who does not allege an interest in the realty mortgaged cannot plead the statute of limitations against the mortgage debt.¹⁴ A different rule is followed in some jurisdictions, and it is held that a creditor may plead limitations for his debtor against another creditor.¹⁵ This last rule is, however, usually limited to cases of insolvency.¹⁶

X. PRESUMPTION OF PAYMENT.

§1704. Presumption of payment.

At Common Law, independently of statute, a presumption arose after twenty years from the time that a right of action

⁹ Allen v. Smith, 129 U. S. 465; Ward v. Waterman, 85 Cal. 488; 24 Pac. 930; Brookville National Bank v. Kimble, 76 Ind. 203; Ordway v. Cowles, 45 Kan. 447; 25 Pac. 862; Anderson v. McNeal, — Miss. —; 34 So. 1; Plummer v. Rohman, 61 Neb. 61; 84 N. W. 600; Dayton Spice Mills Co. v. Sloan, 49 Neb. 622; 68 N. W. 1040; Shepard's Estate, 180 Pa. St. 57; 36 Atl. 422; Stanford v. Andrews, 12 Heisk. (Tenn.) 664; Columbia, etc., Trust Co. v. Strawn, 93 Tex. 48; 53 S. W. 342; Welton v. Boggs, 45 W. Va. 620; 72 Am. St. Rep. 833; 32 S. E. 232; Baltimore, etc., R. R. v. Vanderwerker, 44 W. Va. 229; 28 S. E. 829.

¹⁰ Sanger v. Nightingale, 122 U. S. 176; Gault v. Trust Co., 100 Ky. 578; 38 S. W. 1065. *Contra*, Lent v. Shear, 26 Cal. 361.

¹¹ Anderson v. McNeal. — Miss. —; 34 So. 1.

¹² Welton v. Boggs, 45 W. Va. 620; 72 Am. St. Rep. 833; 32 S. E. 232.

¹³ Allen v. Smith, 129 U. S. 465.

¹⁴ Corbey v. Rogers, 152 Ind. 169; 52 N. E. 748. (Even if in the petition he is alleged to have or claim some interest in the realty.)

¹⁵ Callaway's Administrator v. Saunders, 99 Va. 350; 38 S. E. 182.

¹⁶ Sawyer v. Sawyer, 74 Me. 579; Oates v. Lilly, 84 N. C. 643.

upon a debt accrued that such debt had been paid.¹ In Tennessee sixteen years is taken as the time after which a presumption of payment would arise,² and in some other states statutes have been passed shortening the time after which such presumption arises.³ A statute shortening the time within which a presumption of payment arises does not apply to pre-existing liabilities, such as judgments⁴ which were due and owing when the statute was passed. This rule applies to the so-called contracts of record, such as judgments;⁵ to specialties;⁶ and to simple contracts, such as notes.⁷ No presumption of payment arises from mere lapse of time in case of a decree declaring a vendor's lien on certain realty and ordering a sale

¹ *Hillary v. Waller*, 12 Ves. Jr. 239; *Oswald v. Legh*, 1 T. R. 270; *Gaines v. Miller*, 111 U. S. 395; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894; 6 So. 46; 9 So. 265; *Locke v. Caldwell*, 91 Ill. 417; *Courtney v. Standenmeyer*, 56 Kan. 392; 54 Am. St. Rep. 592; 43 Pac. 758; *Anderson v. Smith*, 3 Met. (Ky.) 491; *Denny v. Eddy*, 22 Pick. (Mass.) 533; *Barker v. Jones*, 62 N. H. 497; 13 Am. St. Rep. 586; *Bean v. Tonnele*, 94 N. Y. 381; 46 Am. Rep. 153; *Allen v. Everly*, 24 O. S. 97; *Beekman v. Hamlin*, 19 Or. 383; 20 Am. St. Rep. 827; 10 L. R. A. 454; 24 Pac. 195; *Hummel v. Lilly*, 188 Pa. St. 463; 68 Am. St. Rep. 879; 41 Atl. 613; *Gwyn v. Porter*, 5 Heisk. (Tenn.) 253; *Doyle's Administrator v. Beasley*, 99 Va. 428; 39 S. E. 152; *Seymour v. Alkire*, 47 W. Va. 302; 34 S. E. 953.

² *Connecticut Mutual Life Ins. Co. v. Dunscomb*, 108 Tenn. 724; 91 Am. St. Rep. 769; 58 L. R. A. 694; 69 S. W. 345; *McDaniel v. Goodall*, 2 Coldw. (Tenn.) 391; *Gwyn v. Porter*, 5 Heisk. (Tenn.) 253.

³ *St. Francis Mill Co. v. Sugg*, 169 Mo. 130; 69 S. W. 359; *Fisher v. New York*, 67 N. Y. 73; *Wingett's Appeal*, 122 Pa. St. 486; 15 Atl. 863.

⁴ *Wencker v. Thompson's Administrator*, 96 Mo. App. 59; 69 S. W. 743.

⁵ *Gaines v. Miller*, 111 U. S. 395; *Gage v. Downey*, 79 Cal. 140; 21 Pac. 527, 855; *Maxwell v. De Valinger*, 2 Penne. (Del.) 504; 47 Atl. 381; *Beekman v. Hamlin*, 19 Or. 383; 20 Am. St. Rep. 827; 10 L. R. A. 454; 24 Pac. 195; *Hummel v. Lilly*, 188 Pa. St. 463; 68 Am. St. Rep. 879; 41 Atl. 613; *Smith v. Schoenberger*, 176 Pa. St. 95; 34 Atl. 954; *Latimer v. Trowbridge*, 52 S. C. 193; 68 Am. St. Rep. 893; 29 S. E. 634.

⁶ *Gaines v. Miller*, 111 U. S. 395; *Williams v. Mitchell*, 112 Mo. 300; 20 S. W. 647; *Devereux's Estate*, 184 Pa. St. 429; 39 Atl. 225; *Dickson v. Gourdin*, 26 S. C. 391; 2 S. E. 303; *Doyle's Administrator v. Beasley*, 99 Va. 428; 39 S. E. 152.

⁷ *Courtney v. Staudenmayer*, 56 Kan. 392; 54 Am. St. Rep. 592; 43 Pac. 758; *Owens v. Owens* (Ky.),

thereof, but not rendering a personal judgment.⁸ No presumption arises in a period less than that fixed by Common Law or statute as the period after which such presumption arises,⁹ even if only a day less.¹⁰ However, lapse of time less than the requisite period may be considered as a material fact in determining whether as a fact payment has or has not been made.¹¹ The time after which this presumption arises begins to run only at the maturity of the debt. If the contract provides that payment for services rendered should be made when the party for whom they were rendered wished no further rendition, no presumption arises that such services were paid for before their termination, though they extended over a long period of time.¹² Time during which a suit is pending to set aside an alleged fraudulent conveyance made by the judgment debtor should not be counted in determining whether judgments recovered by the creditors who brought such suit are presumed to have been paid.¹³ The presumption arises in a particular case only when the debtor denies the debt. A third person, claiming title to realty adversely to a mortgagor and his mortgagee, cannot, in an action in ejectment brought by the mortgagee, invoke lapse of time between the execution of such mortgage and its foreclosure to show that the mortgage debt has been paid.¹⁴ This presumption is *prima facie* only and may be rebutted.¹⁵ Insolvency of the debtor may be

52 S. W. 943; *Barker v. Jones*, 62 N. H. 497; 13 Am. St. Rep. 586; *Walls v. Walls*, 170 Pa. St. 48; 32 Atl. 649.

⁸ *Moore v. Williams*, 129 Ala. 329; 29 So. 795.

⁹ *Swatts v. Bowen*, 141 Ind. 322; 40 N. E. 1057; *Ludwig v. Blackshire*, 102 Ia. 366; 71 N. W. 356; *Stockton v. Johnson*, 6 B. Mon. (Ky.) 408; *Fletcher v. Fletcher's Estate*, 72 Vt. 268; 47 Atl. 777.

¹⁰ *Calwell v. Prindle*, 19 W. Va. 604.

¹¹ *Manning v. Meredith*, 69 Ia. 430; 29 N. W. 336; *Moore v. Pogue*,

1 Duv. (Ky.) 327; *Walls v. Walls*, 170 Pa. St. 48; 32 Atl. 649.

¹² *Ryans v. Hospes*, 167 Mo. 342, 67 S. W. 285.

¹³ *St. Francis Mill Co. v. Sugg*, 169 Mo. 130; 69 S. W. 359.

¹⁴ *Glezen v. Haskins*, 23 R. I. 601; 51 Atl. 219.

¹⁵ *In re Dixon* (1899), 2 Ch. 561; *Brobst v. Brock*, 10 Wall. (U. S.) 519; *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894; 6 So. 46; 9 So. 265; *Courtney v. Staudenmayer*, 56 Kan. 392; 54 Am. St. Rep. 592; 43 Pac. 758; *Herndon v. Bartlett*, 7 T. B. Mon. (Ky.) 449; *Fuller v.*

shown to rebut the presumption of payment,¹⁶ but to do so in solvency must be shown to have lasted during the entire period,¹⁷ and actual insolvency as distinguished from lack of affluence is necessary to produce this result.¹⁸ The facts that the debtor has been nearly insolvent and that the note evidencing the debt, and the collateral security out of which the creditor is seeking to enforce the debt are both in the hands of the creditor, have been held sufficient to rebut such presumption.¹⁹ An acknowledgment of the debt within twenty years preceding the action, if made by the debtor, rebuts such presumption.²⁰ Thus a deed, made by the trustee of a trust deed by way of mortgage, after the maturity of the deed, is sufficient to rebut the presumption of payment.²¹ Unlike the rule which applies to acknowledgments which prevent the application of the statutes of limitation, such acknowledgment need not recognize the debt as a valid and subsisting obligation, and need not expressly nor impliedly contain a promise to pay. It is sufficient if it shows that the debt in question has never been paid.²² An admission of non-payment coupled with a refusal

Cushman, 170 Mass. 286; 49 N. E. 631; Barker v. Jones, 62 N. H. 497; 13 Am. St. Rep. 586; Macaulay v. Palmer, 125 N. Y. 742; 26 N. E. 912; Alston v. Hawkins, 105 N. C. 3; 18 Am. St. Rep. 874; 11 S. E. 164; Allen v. Everly, 24 O. S. 97; Smith's Estate, 177 Pa. St. 437; 35 Atl. 680; Latimer v. Trowbridge, 52 S. C. 193; 68 Am. St. Rep. 893; 29 S. E. 634; Connecticut Mutual Life Ins. Co. v. Duncomb, 108 Tenn. 724; 91 Am. St. Rep. 769; 58 L. R. A. 694; 69 S. W. 345; Lyon v. Guild, 5 Heisk. (Tenn.) 175; Jameson v. Rixey, 94 Va. 342; 64 Am. St. Rep. 726; 26 S. E. 861.

¹⁶ Boardman v. De Forest, 5 Conn. 1; Wanamaker v. Van Buskirk, 1 N. J. Eq. 685; 23 Am. Dec. 748; Devereux's Estate, 184 Pa. St. 429; 39 Atl. 225; Connecticut Mutual

Life Ins. Co. v. Duncomb, 108 Tenn. 724; 91 Am. St. Rep. 769; 58 L. R. A. 694; 69 S. W. 345.

¹⁷ Farmers' Bank v. Leonard, 4 Har. (Del.) 536; Alston v. Hawkins, 105 N. C. 3; 18 Am. St. Rep. 874; 11 S. E. 164.

¹⁸ Rogers v. Judd, 5 Vt. 236; 26 Am. Dec. 301.

¹⁹ Connecticut Mutual Life Ins. Co. v. Duncomb, 108 Tenn. 724; 91 Am. St. Rep. 769; 58 L. R. A. 694; 69 S. W. 345.

²⁰ Hughes v. Edwards, 9 Wheat. (U. S.) 489; Cartwright v. Kerman, 105 N. C. 1; 10 S. E. 870; White v. White, 200 Pa. St. 565; 50 Atl. 157; Smith v. Schoenberger, 176 Pa. St. 95; 34 Atl. 954.

²¹ Lewis v. Schwenn, 93 Mo. 26; 3 Am. St. Rep. 511; 2 S. W. 391.

²² Hughes v. Edwards, 9 Wheat

to pay is sufficient to rebut the presumption of payment.²³ Such an acknowledgment is sufficient if made to a third person and not to the creditor, on the theory of an admission contrary to interest.²⁴ Part payment by a debtor within twenty years before action is begun rebuts such presumption.²⁵ Unlike part payment which prevents limitations from running,²⁶ part payment to rebut such presumption may be made by one of several joint debtors.²⁷ Evidence which would have prevented limitations from running is sufficient to rebut the presumption of payment. Thus absence of the debtor from the state²⁸ rebuts such presumption. The passage of the statute of limitations has not deprived the rule of presumption of payment of all force and effect in law.²⁹ The presumption of payment may operate where for some cause,³⁰ such as absence of the defendant from the state,³¹ limitations has not run. In some jurisdictions, however, the passage of the statute of limitations has been held to reduce the period after which this presumption arises from the Common-Law period of twenty to the period of limitations fixed by statute.³² Such presumption applies in an action by the state,³³ contrary to the rule applicable to the statute of limitations.

(U. S.) 489; *Bissell v. Jaudon*, 16 O. S. 498; *Breneman's Appeal*, 121 Pa. St. 641; 15 Atl. 650.

²³ *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. St. Rep. 804; 15 Atl. 452.

²⁴ *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Runner's Appeal*, 121 Pa. St. 649; 15 Atl. 650.

²⁵ *In re Dixon* (1899), 2 Ch. 561; *Denny v. Eddy*, 22 Pick. (Mass.) 533; *White v. Beaman*, 96 N. C. 122; 1 S. E. 789; *Bissell v. Jaudon*, 16 O. S. 498.

²⁶ See § 1692.

²⁷ *Denny v. Eddy*, 22 Pick. (Mass.) 533; *Dickson v. Gourdin*, 29 S. C. 343; 1 L. R. A. 628; 7 S. E. 510.

²⁸ *Latimer v. Trowbridge*, 52 S. C.

193; 68 Am. St. Rep. 893; 29 S. E. 634. Apparently *contra*, *Courtney v. Staudenmayer*, 56 Kan. 392; 54 Am. St. Rep. 592; 43 Pac. 758.

²⁹ *Booker v. Booker*, 29 Gratt. (Va.) 605; 26 Am. Rep. 401.

³⁰ *Wright v. Mars*, 22 S. C. 585; *Hale v. Pack*, 10 W. Va. 145.

³¹ *Courtney v. Staudenmayer*, 56 Kan. 392; 54 Am. St. Rep. 592; 43 Pac. 758.

³² *Atkinson v. Dance*, 9 Verg. (Tenn.) 424; 30 Am. Dec. 422; *Walker v. Emerson*, 20 Tex. 706; 73 Am. Dec. 207.

³³ *In re Ash's Estate*, 202 Pa. St. 422; 90 Am. St. Rep. 658; 51 Atl. 1030.

CHAPTER LXXVIII.

LIMITATIONS IN EQUITY AND LACHES.

§1705. Limitations in equity.

If the statute of limitations is so worded as to apply to actions at law, it does not uniformly restrict the power of the courts of equity to administer equitable relief,¹ and such relief may in proper cases be granted after the time fixed by limitations has elapsed,² "for the reason that the words of the statute apply only to particular legal remedies."³ In such cases the effect of limitations upon equitable jurisdiction turns on the question whether the jurisdiction of equity is exclusive or concurrent. If the jurisdiction of equity is exclusive the statute of limitations is not binding upon courts of equity if it purports to apply only to actions at law.⁴ Equity will, however, in the absence of exceptional facts, treat the statutes of limitations as a legal analogy,⁵ which, though not binding upon them, they will follow.⁶ If the jurisdiction of equity is con-

¹ Presley v. Weakley, 135 Ala. 517; 93 Am. St. Rep. 39; 33 So. 434.

² Michoud v. Girod, 4 How. (U. S.) 503; Belknap v. Gleason, 11 Conn. 160; 27 Am. Dec. 721; Lincoln v. Judd, 49 N. J. Eq. 387; 24 Atl. 318; McLain v. Ferrell, 1 Swan (Tenn.) 48.

³ Colton v. Depew, 60 N. J. Eq. 454, 458; 83 Am. St. Rep. 650; 46 Atl. 728.

⁴ McKnight v. Taylor, 1 How. (U. S.) 161; Presley v. Weakley, 135 Ala. 517; 93 Am. St. Rep. 39; 33 So. 434; Locke v. Caldwell, 91 Ill. 417; Gates v. Jacob, 1 B. Mon. (Ky.)

306; McLain v. Ferrell, 1 Swar (Tenn.) 48.

⁵ "The statute is an expression of public policy and as such is proper to be looked to by courts of equity in determining the proper limit of time to be ordinarily allowed." Presley v. Weakley, 135 Ala. 517, 521; 93 Am. St. Rep. 39; 33 So. 434.

⁶ Sullivan v. Ry., 94 U. S. 806; Presley v. Weakley, 135 Ala. 517; 93 Am. St. Rep. 39; 33 So. 434; Taylor v. Campbell, 59 Tex. 315; Switzer v. Noffsinger, 82 Va. 518; Wheeling v. Campbell, 12 W. Va. 36.

current with that of law, the statute of limitations is looked upon as binding upon courts of equity.⁷ Thus if a debt enforceable at law is created by the trustee for the benefit of the trust estate, and in equity can be enforced against such estate, such right in equity is barred when the right of action at law on the debt would be barred.⁸ So a cause of action for fraud⁹ or for conversion¹⁰ is barred in equity when it is barred at law. If the law gives two legal remedies, which are barred at different intervals of time, a concurrent equitable remedy is not barred until both legal remedies are barred.¹¹ Thus if at law the mortgagee has two remedies, one on the debt for a personal judgment and one on the mortgage to recover the land, the equitable remedy of foreclosure is not barred until both legal remedies are barred.¹² In some states, however, statutes of limitation are so worded as to include equitable suits as well as legal actions. Among these states are those in which the Code of Civil Procedure has been adopted. Where such statutes are in force no question exists as to their effect on suits in equity.

§1706. Nature and theory of laches.

Independent of the statutes of limitations and in cases to which for the most part such statutes could not apply, equity

⁷ *Baker v. Cummings*, 169 U. S. 189; *Metropolitan Bank v. Dispatch Co.*, 149 U. S. 436; *Miller v. M'Intyre*, 6 Pet. (U. S.) 61; *Harding v. Durand*, 138 Ill. 515; 28 N. E. 948; *Waller v. Demint*, 1 Dana (Ky.) 92; 25 Am. Dec. 134; *Gutch v. Fosdick*, 48 N. J. Eq. 353; 27 Am. St. Rep. 473; 22 Atl. 590; *Yearly v. Long*, 40 O. S. 27; *Hughes v. Brown*, 88 Tenn. 578; 8 L. R. A. 480; 13 S. W. 286; *Smith v. Fly*, 24 Tex. 345; 76 Am. Dec. 109; *Drumright v. Hite*, 2 Va. Dec. 465; 26 S. E. 583; *Sibley v. Stacey*, 53 W. Va. 292; 44 S. E. 420. "Courts of equity in cases of concurrent jurisdiction consider themselves bound by

the statutes of limitation which govern actions at law." Syllabus in *Metropolitan Bank v. Dispatch Co.*, 149 U. S. 436; quoted in *Baker v. Cummings*, 169 U. S. 189, 206.

⁸ *Hughes v. Brown*, 88 Tenn. 578; 8 L. R. A. 480; 13 S. W. 286.

⁹ *Baker v. Cummings*, 169 U. S. 189.

¹⁰ *Metropolitan Bank v. Dispatch Co.*, 149 U. S. 436.

¹¹ *Colton v. Depew*, 60 N. J. Eq. 454; 83 Am. St. Rep. 650; 46 Atl. 728; *Burdoin v. Shelton*, 10 Yerg. (Tenn.) 41.

¹² *Colton v. Depew*, 60 N. J. Eq. 454; 83 Am. St. Rep. 650; 46 Atl. 728.

has developed the doctrine of laches as a bar to a suit in equity.¹ The theory of laches is not that lapse of time alone is a bar, for, as has been stated elsewhere, lapse of time is not of itself a bar in equity in the absence of express statute. The underlying theory is, without reference to the amount of time which has elapsed,² that if the injured party has full knowledge of the facts and is in no way prevented or hindered from bringing suit, but instead of suing in a reasonable time waits until circumstances intervene either in the condition of the adverse party, the nature and value of the property, the evidence available to the adversary party, or the rights of third persons, which make it inequitable to allow relief, equity will refuse relief.³ Laches is ordinarily merely a defense. In some exceptional cases, however, it may be the basis of affirmative relief. Thus A agreed to buy land from B and gave notes

¹ "There is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim where no statute of limitations directly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights or long acquiescence in the assertion of adverse rights." *Wagner v. Baird*, 7 How. (U. S.) 234, 258; quoted in *Abraham v. Ordway*, 158 U. S. 416, 422. See for similar language *Hammond v. Hopkins*, 143 U. S. 224; *Patterson v. Hewitt*, — N. M. —; 55 L. R. A. 658; 66 Pac. 552.

² "Laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties." *Gallicher v. Cadwell*, 145 U. S. 368, 373; quoted in *Penn Mutual Life Ins.*

Co. v. Austin, 168 U. S. 685, 699.

³ *United States v. Martinez*, 184 U. S. 441; *Whitney v. Fox*, 166 U. S. 637; *Willard v. Wood*, 164 U. S. 502; *Hammond v. Hopkins*, 143 U. S. 224; *Speidel v. Henrici*, 120 U. S. 377; *Potts v. Alexander*, 118 Fed. 885; *Bell v. Hudson*, 73 Cal. 285; 2 Am. St. Rep. 791; 14 Pac. 791; *Lux v. Haggin*, 69 Cal. 255; 10 Pac. 674; *Hendry v. Benlisa*, 37 Fla. 609; 34 L. R. A. 283; 20 So. 800; *Wilcoxon v. Wilcoxon*, 199 Ill. 244; 65 N. E. 229; *Walker v. Ray*, 111 Ill. 315; *Kirby v. Jacobs*, 13 B. Mon. (Ky.) 435; *Ayer v. Stewart*, 14 Minn. 97; *De Graw v. Mechan*, 48 N. J. Eq. 219; 21 Atl. 193; *Patterson v. Hewitt*, — N. M. —; 55 L. R. A. 658; 66 Pac. 552; *Wilson v. Wilson*, 41 Or. 459; 69 Pac. 923; *In re Wehrle's Estate*, 205 Pa. St. 62; 54 Atl. 511; *Phillips v. Yon*, 61 S. C. 426; 39 S. E. 618; *Doggett v. Helm*, 17 Gratt. (Va.) 96; *Phillips v. Coke Co.*, 53 W. Va. 543; 44 S. E. 774; *Ohio River Ry. Co. v. Johnson*, 50 W. Va. 499; 40 S. E. 407.

therefor. Judgment was subsequently taken on such notes, but the judgments were never paid. Years after, when the land had risen in value greatly and A had become insolvent, it was held that B's administrator could have such contract cancelled, since A, by reason of his laches, had lost the right to specific performance.⁴

§1707. Elements of laches.—Lapse of time.

The elements which constitute laches are (1) unexplained delay for an unreasonable time; and (2) prejudice to the adversary party or to third parties which will be occasioned by such delay if equitable relief is allowed. It is difficult to consider these elements separately. On the one hand an unexplained and unreasonable delay is an essential element of laches. If the plaintiff acts promptly no laches exists. Hence lapse of time in enforcing a trust which the trustee has not repudiated is not laches.¹ On the other hand, lapse of time is not of itself laches if the party against whom relief is sought is not prejudiced by the delay.² Thus delay in pushing a suit against an indorser whereby he is benefited, inasmuch as the party primarily liable is induced to make payments upon the debt, is not laches.³ Delay for a long period of time, if unexplained, may amount to laches *prima facie*.⁴ If properly explained, however, delay even for a long period does not amount to laches.⁵ The effect of the statute of limitations upon the doc-

⁴ *Headry v. Benlisa*, 37 Fla. 609; 34 L. R. A. 283; 20 So. 800.

¹ *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523; 1 L. R. A. 327; 18 N. E. 334.

² *Merrill v. Bank*, 173 U. S. 131; *Johnson v. Transit Co.*, 156 U. S. 618; *Citizens' National Bank v. Judy*, 146 Ind. 322; 43 N. E. 259; *Luke v. Koenen*, 120 Ia. 103; 94 N. W. 278; *City of Leavenworth v. Douglass*, 59 Kan. 416; 53 Pac. 123; *Hamilton v. Dooley*, 15 Utah 280; 49 Pac. 769; *Pethtei v. McCullough*, 49

W. Va. 520; 39 S. E. 199; *Cedar Lake Hotel Co. v. Hydraulic Co.*, 79 Wis. 297; 48 N. W. 371.

³ *Tidball's Executors v. Bank*, 100 Va. 741; 42 S. E. 867.

⁴ *Willard v. Wood*, 164 U. S. 502; *Chapman v. Bank*, 97 Cal. 155; 31 Pac. 896; *Snow v. Mfg. Co.*, 153 Mass. 456; 26 N. E. 1116; *Wainwright v. Massenburg*, 129 N. C. 46; 39 S. E. 725. (Delay for fifty years.)

⁵ *Nelson v. Carrington*, 4 Munf. (Va.) 332; 6 Am. Dec. 519.

trine of laches depends on the extent to which such statute is treated as either binding on courts of equity or merely an analogy which in proper cases courts of equity will follow. In some jurisdictions limitations applies to suits at equity,⁶ and is subject to the same exceptions as those recognized at law.⁷ In such jurisdictions the doctrine of laches does not apply in cases of concurrent jurisdiction.⁸ Delay short of the period of limitations is no bar in equity.⁹ In other jurisdictions the doctrine of laches is invoked irrespective of the statute of limitations.¹⁰ Equity may, therefore, refuse relief, though the time fixed by the statute of limitations has not expired.¹¹ Delay not exceeding the statutory period of limitations does not necessarily amount to laches,¹² though special facts may make laches exist within a period shorter than that of limitations.¹³ The period of limitations is in the absence of controlling facts to the contrary taken as an analogy. In case of delay beyond the statutory period of limitations the party seeking relief must, in order to obtain it, show facts excusing such delay.¹⁴

⁶ *Sioux City, etc., Ry. v. O'Brien* County, 118 Ia. 582; 92 N. W. 857.

⁷ *Newberger v. Wells*, 51 W. Va. 624; 42 S. E. 625.

⁸ *Higgins, etc., Co. v. Snow*, 113 Fed. 433; 51 C. C. A. 267.

⁹ *Ludington v. Patton*, 111 Wis 208; 86 N. W. 571.

¹⁰ *Guarantee, etc., Co. v. Pine-Land Co.*, 104 Fed. 5; 43 C. C. A. 396; *Patterson v. Hewitt*, — N. M. —; 55 L. R. A. 658; 66 Pac. 552.

¹¹ *Sena v. United States*, 189 U. S. 233; *Potts v. Alexander*, 118 Fed. 885; *Great Western Mining Co. v. Mining Co.*, 14 Colo. 90; 23 Pac. 908; *Phillips v. Rogers*, 12 Met. (Mass.) 405; *Peters v. Delaplaine*, 49 N. Y. 362; *Wilson v. Wilson*, 41 Or. 459; 69 Pac. 923; *Wilson v.*

Harper, 25 W. Va. 279. "Equity will sometimes refuse relief where a shorter time than that prescribed by the statute of limitations has elapsed without suit. It ought always to do so where, as in this case, the delay in the assertion of rights is not adequately explained and such circumstances have intervened in the condition of the adverse party as to render it unjust to him or to his estate that a court of equity should assist the plaintiff." *Whitney v. Fox*, 166 U. S. 637, 647.

¹² *Michigan Trust Co. v. Red Cloud* (Neb.), 92 N. W. 900.

¹³ *Ide v. Carpet Co.*, 115 Fed. 137.

¹⁴ *Boynton v. Haggart*, 120 Fed. 819.

§1708 Prejudice resulting from lapse of time.

Prejudice resulting to the adversary party or to a third party from lapse of time is an essential element of laches, without which mere delay does not amount to laches.¹ If such prejudice results from such unreasonable and unexplained delay, however, laches exists.² Thus the acquisition by innocent third persons of interests in the property the recovery of which is sought, as by purchase,³ or by taking a mortgage thereon as security for a loan,⁴ has been held sufficient when coupled with unreasonable delay on the part of the plaintiff to prevent him from obtaining equitable relief. Thus a city in alleged violation of its contract with a water company proceeded to issue bonds and with the proceeds to build its own waterworks, out of the revenues arising from which such bonds were to be paid. Such water company and its bondholders objected orally to such conduct, but took no steps to preserve their rights by litigation until the city had issued bonds and out of the proceeds had constructed a dam across the Colorado River and had laid pipe. It was held that, whatever the original rights of the parties, they had, by their laches, lost the right to equitable relief by injunction against the completion of the waterworks.⁵ So an action to charge land with an invalid

¹ See §§ 1706, 1707.

² *O'Brien v. Wheelock*, 184 U. S. 450; *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685; *Abraham v. Ordway*, 158 U. S. 416; *Fisher v. Patterson*, 197 Ill. 414; 64 N. E. 353; affirming 99 Ill. App. 70; *Walker v. Warner*, 179 Ill. 16; 53 N. E. 594; *Long v. Olson*, 115 Ia. 388; 88 N. W. 933; *Holman v. Winterboer*, 107 Ia. 270; 77 N. W. 1060; *Dunbar v. Green*, 66 Kan. 557; 72 Pac. 243; *Smith v. Carlow*, 114 Mich. 67; 72 N. W. 22; *Coyne v. Sayre*, 54 N. J. Eq. 702; 36 Atl. 96; *Burr v. Kase*, 168 Pa. St. 81; 31 Atl. 954; *Gorham v. Sayles*, 23 R. I. 449; 50 Atl. 848; *Chase v. Chase*, 20 R. I. 202; 37 Atl. 804; *Nelson v. Triplett*,

99 Va. 421; 39 S. E. 150; *Shields v. Tarleton*, 48 W. Va. 343; 37 S. E. 589.

³ *Abraham v. Ordway*, 158 U. S. 416 (delay of twenty years); *Fisher v. Patterson*, 197 Ill. 414; 64 N. E. 353 (delay of two and one-half years after knowledge of facts); *Gorham v. Sayles*, 23 R. I. 449; 50 Atl. 848 (delay of twenty-two years); *Nelson v. Triplett*, 99 Va. 421; 39 S. E. 150 (delay of twenty-five years); *Shields v. Tarleton*, 48 W. Va. 343; 37 S. E. 589 (delay of almost twenty-one years).

⁴ *Johnson v. Transit Co.*, 156 U. S. 618. (Delay of seven years.)

⁵ *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685.

levee assessment, on the theory that the owner was estopped to deny the validity of such assessments, is barred where the property had changed hands repeatedly and the owners had spent large sums for repairing the levee and had become liable for large assessments under a new statute.⁶ The facts that the plaintiff has waited an unreasonable time, and that the value of the property whose recovery is sought has advanced greatly, will prevent relief from being given.⁷ Accordingly in property the value of which is fluctuating and speculative⁸ such as oil⁹ or mining¹⁰ properties, a delay may be unreasonable, though in case of property of more stable value it would not be unreasonable. A delay for so long a time that it has become difficult to procure evidence,¹¹ as of oral offers dealing with technicalities of a manufacture¹² may amount to laches. So a delay in enforcing a contract until the adversary party is broken down mentally¹³ or is dead¹⁴ is laches. A delay for an unreasonable time during which the adversary party expends money or labor upon the property in dispute¹⁵ is laches. However, allowing the sanitary district of Chicago to construct a drainage canal was held not to be laches.¹⁶

⁶ O'Brien v. Wheelock, 184 U. S. 450.

⁷ Twin Lick Oil Co. v. Marbury, 91 U. S. 587 (delay of four years); Hendry v. Benlisa, 37 Fla. 609; 34 L. R. A. 283; 20 So. 800; Dunbar v. Green, 66 Kan. 557; 72 Pac. 243.

⁸ Hayward v. Bark, 96 U. S. 611; Royal Bank v. Depot Co., 125 Mass. 490; Melms v. Brewing Co., 93 Wis. 153; 57 Am. St. Rep. 879; 46 L. R. A. 478; 66 N. W. 518.

⁹ Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

¹⁰ Gildersleeve v. Mining Co., 161 U. S. 573; Johnston v. Mining Co., 148 U. S. 360; Compo v. Iron Co., 50 Mich. 578; 16 N. W. 295; Barnard v. Iron Co., 85 Tenn. 139; 2 S. W. 21.

¹¹ Whitney v. Fox, 166 U. S. 637;

Willard v. Wood, 164 U. S. 502; Bell v. Hudson, 73 Cal. 285; 2 Am. St. Rep. 791; 14 Pac. 791; Thomas v. Van Meter, 164 Ill. 304; 45 N. E. 405; Harrod v. Flountleroy, 3 J. J. Mar. (Ky.) 548; Doane v. Preston, 183 Mass. 569; 67 N. E. 867; Wilson v. Wilson, 41 Or. 459; 69 Pac. 923; Bolton v. Dickens, 4 Lea (Tenn.) 569; Cross v. Bowker, 102 Wis. 497; 78 N. W. 564.

¹² Doane v. Preston, 183 Mass. 569; 67 N. E. 867.

¹³ Whitney v. Fox, 166 U. S. 637.

¹⁴ Yeamans v. James, 29 Kan. 373; Dismal Swamp Land Co. v. Macauley's Admr., 85 Va. 16; 6 S. E. 697.

¹⁵ Long v. Olson, 115 Ia. 388; 88 N. W. 933.

¹⁶ Missouri v. Illinois, 180 U. S. 208.

§1709. Excuses for delay.—Disability.

Delay is an element of laches only when unexcused. The existence of facts which excuse delay prevent it, therefore, from amounting to laches. Among the facts which amount in equity to an excuse for delay are infancy of the injured party,¹ except where the cause of action accrued during the lifetime of his ancestor who was competent to sue;² coverture,³ except where the injury concerns her separate estate with which she is empowered to deal as a *feme sole*,⁴ and insanity or imbecility,⁵ even if the next friend who sues for the imbecile is himself guilty of laches.⁶ The fact that the injured party is an Indian in tribal relations has been held not to prevent the doctrine of laches from applying.⁷

§1710. Ignorance of rights.

Knowledge of one's rights or a reasonable opportunity of acquiring it, is an essential element of unexcusable delay.¹ The fact, therefore, that one is ignorant of his rights, his ignorance not being due to his own negligence,² as where his ignorance of his rights is due to the fraud of the adversary party,³ or where his right of action grows out of the fraud

¹ *Miles v. Wheeler*, 43 Ill. 123; *Whaley v. Eliot*, 1 A. K. Mar. (Ky.) 343; 10 Am. Dec. 737; *Kroenung v. Goehri*, 112 Mo. 641; 20 S. W. 661; *Gaugh v. Henderson*, 2 Head. (Tenn.) 628.

² *Gibson v. Herriott*, 55 Ark. 85; 29 Am. St. Rep. 17; 17 S. W. 589; *Williams v. Presbyterian Society*, 1 O. S. 478.

³ *Black v. Whitall*, 9 N. J. Eq. 572; 59 Am. Dec. 423; *Baker v. Morris*, 10 Leigh (Va.) 284.

⁴ *Phillips v. Coal Co.*, 53 W. Va. 543; 44 S. E. 774.

⁵ *Van Buskirk v. Van Buskirk*, 148 Ill. 9; 35 N. E. 383; *Kidder v. Houston* (N. J. Eq.), 47 Atl. 336; *Craig v. Leiper*, 2 Yerg. (Tenn.) 193; 24 Am. Dec. 479.

⁶ *Kidder v. Houston* (N. J. Eq.), 47 Atl. 336.

⁷ *Pope v. Falk*, 66 Kan. 793; 72 Pac. 246; *Dunbar v. Green*, 66 Kan. 557; 72 Pac. 243. *Contra*, *Felix v. Patrick*, 145 U. S. 317.

¹ *Halstead v. Grinnan*, 152 U. S. 412; *Tarke v. Bingham*, 123 Cal. 163; 55 Pac. 759; *Dice v. Brown*, 98 Ia. 297; 67 N. W. 253; *Wall v. Meilke*, 89 Minn. 232; 94 N. W. 688; *Ellis v. Land Co.*, 102 Wis. 400; 78 N. W. 747.

² *Lurton v. Rodgers*, 139 Ill. 554; 32 Am. St. Rep. 214; 29 N. E. 866; *Whaley v. Eliot*, 1 A. K. Mrr. (Ky.) 343; 10 Am. Dec. 737; *Moorman v. Arthur*, 90 Va. 455; 18 S. E. 869.

³ *Reavis v. Reavis*, 103 Fed. 813.

of the adversary party and his delay is due to the fact that he has not discovered such fraud,⁴ prevents delay from amounting to laches.

§1711. Delay caused by defendant.

Delay on the part of the plaintiff which has been intentionally caused by the defendant,¹ as where the defendant induces delay by recognizing plaintiff's rights,² or by inducing plaintiff to believe that defendant will voluntarily perform the contract which is afterwards the subject of litigation,³ or where defendant requests plaintiff to delay,⁴ such delay is not laches. So a delay caused by the confidence of the plaintiff in the defendant,⁵ or the relationship of the parties,⁶ may be excused and thus prevented from amounting to laches. Laches of the agent is laches of the principal if the latter is under no disability. Accordingly laches of an attorney in whose hands the claim in litigation was placed does not excuse the plaintiff.⁷

⁴ Rosenthal v. Walker, 111 U. S. 185; Horner v. Perry, 112 Fed. 906; Wilson v. Nichols, 72 Conn. 173; 43 Atl. 1052; Wilson v. Augur, 176 Ill. 561; 52 N. E. 289; Butler v. Prentiss, 158 N. Y. 49; 52 N. E. 652; Reeves v. Dougherty, 7 Yerg. (Tenn.) 222; 27 Am. Dec. 496; Virginia Land Co. v. Haupt, 90 Va. 533; 44 Am. St. Rep. 939; 19 S. E. 168.

¹ Townsend v. Vanderwerker, 160 U. S. 171; Lancaster v. Roberts, 144 Ill. 213; 33 N. E. 27; Chance v. Jennings, 159 Mo. 544; 61 S. W. 177; Richards v. Hatfield, 40 Neb. 879; 59 N. W. 777; Johnston v. Trask, 116 N. Y. 136; 15 Am. St. Rep. 394; 5 L. R. A. 630; 22 N. E. 377; Hellams v. Prior, 64 S. C. 296, 543; 42 S. E. 106; 43 S. E. 25.

² Hovey v. Bradbury, 112 Cal. 620; 44 Pac. 1077; Koons v. Blanton, 129 Ind. 383; 27 N. E. 334; Chance v. Jennings, 159 Mo. 544; 61 S. W. 177.

³ Chance v. Jennings, 159 Mo. 544; 61 S. W. 177.

⁴ Hellams v. Prior, 64 S. C. 296, 543; 42 S. E. 106; 43 S. E. 25; Craig v. Leiper, 2 Yerg. (Tenn.) 193; 24 Am. Dec. 479.

⁵ Townsend v. Vanderwerker, 160 U. S. 171.

⁶ Paschall v. Hinderer, 28 O. S. 568; Prewitt v. Bunch, 101 Tenn. 723; 50 S. W. 748; Fawcett v. Fawcett, 85 Wis. 332; 39 Am. St. Rep. 844; 55 N. W. 405.

⁷ Ives v. Sargent, 119 U. S. 652; Wilson v. Smith, 117 Fed. 707.

CHAPTER LXXIX.

NON-CLAIM.

§1712. Statutes of non-claim.

A group of statutes analogous in some respects to statutes of limitation may be briefly noted. These are the statutes which provide that in administering the estates of decedents, insolvents and the like, claims against such estates must be presented within a certain time or be barred.¹ A modification of the statute shortening the time for presenting claims, is not retroactive unless the statute specifically so provides.² The repeal of the statute of non-claim before the time limited therein has expired leaves the claim subject to the ordinary statute of limitations.³ Under such statutes a creditor who has neglected to present his claim in time cannot evade the bar of the statute by suing in another court than that administering the trust.⁴ Thus while a creditor who is a non-resident cannot be prevented from suing in the Federal courts, he cannot, by suing in such courts evade the bar of the statute.⁵ New assets received after the time limited may be subjected to claims which are barred as to the rest of the estate.⁶ In

¹ Jacob's Estate, 119 Ia. 176; 93 N. W. 94; First National Bank v. Sherman, 117 Mich. 602; 76 N. W. 97; Jorgenson v. Larson, 85 Minn. 134; 88 N. W. 439; Clark v. Gates, 84 Minn. 381; 87 N. W. 941; Beekman v. Richardson, 150 Mo. 430; 51 S. W. 689; Fitzgerald v. Bank, 64 Neb. 260; 89 N. W. 813; Thurber v. Miller, 11 S. D. 124; 75 N. W. 900; Fullerton v. Bailey, 17 Utah 85; 53 Pac. 1020; Fields v. Mundy's Estate, 106 Wis. 383; 80 Am. St.

Rep. 39; 82 N. W. 343; Butler v. Templeton, 115 Wis. 382; 91 N. W. 969.

² Morrisett v. Carr, 127 Ala. 277; 27 So. 844.

³ Judgment. Ryans v. Boogher, 169 Mo. 673; 69 S. W. 1048.

⁴ Security Trust Co. v. Bank, 187 U. S. 211.

⁵ Security Trust Co. v. Bank, 187 U. S. 211.

⁶ Copeland v. Fifield, 180 Mass. 223; 62 N. E. 249.

some jurisdictions such statutes do not apply to estates administered as solvent estates when no time is fixed within which such claims must be presented.⁷ In order to stop the operation of the statute the claim must be presented by the creditor or by his duly authorized agent.⁸

§1713. Exceptions to statute of non-claim must be statutory.

Unless a special exception is made by the terms of the statute, no exception thereto exists in favor of persons under disabilities.¹ Without specific exception such a statute applies to non-resident creditors.² In the absence of statutory provision therefor facts arising subsequently to the time that the statute begins to run do not prevent it from continuing to run. Thus if a means is provided for presenting the claim to the probate court, or otherwise complying with the statute, the death³ or absence⁴ of the executor, or the revocation of letters of administration when a will is subsequently discovered,⁵ none of them start the statute of non-claim to running anew. The administrator cannot waive the operation of this statute.⁶ The promise of an administrator to pay the debt does not excuse a failure to present it as required by the statute.⁷ After the time fixed by statute has elapsed, the executor cannot waive the omission to present the claim for payment, and pay the debt.⁸ Knowledge of the existence of the claim which the personal representative may have does not dispense with presenting it.⁹ In

⁷ Appeal of Mason, 75 Conn. 406; 53 Atl. 895.

⁸ Rayburn v. Rayburn, 130 Ala. 217; 30 So. 365.

¹ Morgan v. Hamlet, 113 U. S. 449; Hall v. Bumstead, 20 Pick. (Mass.) 2; Williams v. Conrad, 11 Humph. (Tenn.) 412.

² Security Trust Co. v. Bank, 187 U. S. 211; Winter v. Winter, 101 Wis. 494; 77 N. W. 883.

³ Lowe v. Jones, 15 Ala. 545.

⁴ Douglass v. Folsom, 21 Nev. 441; 33 Pac. 660.

⁵ Shepard v. Rhodes, 60 Ill. 301.

However, by statute granting new letters of administration may start the statute of non-claim to running anew. Eddy v. Adams, 145 Mass. 489; 14 N. E. 509.

⁶ Cockrell v. Seasongood, — Miss. —; 33 So. 77.

⁷ Lewis v. Champion, 40 N. J. Eq. 59.

⁸ Gilman v. Maxwell, 79 Minn. 377; 82 N. W. 669.

⁹ Borum v. Bell, 132 Ala. 85; 31 So. 454; Morse v. Ry., 191 Ill. 356; 61 N. E. 104; affirming 93 Ill. App. 31.

Iowa, by statute, the existence of peculiar circumstances excuses presentation of claims. False statements by the executor as to the solvency of the estate and the fact that it is still unsettled may in equity excuse a failure to file the claim in time.¹⁰ False statements by the cashier of a bank with which holder of a note had deposited it that he had filed the claim, may excuse such failure.¹¹

§1714. When statute begins to run.

Under such statutes time does not by the terms thereof begin to run until an executor is appointed,¹ or as most statutes provide, when notice of his appointment is given.²

§1715. To what claims statute applies.

Such statutes do not apply to claims which are contingent and unliquidated at decedent's death,¹ as a stockholder's liability on which no assessment has been made,² or which have not then accrued, as a stock subscription payable on call, before the call has been made.³ But if a suit to enforce a stock liability is pending when the stockholder dies, delay in presenting such claim will bar it by the statute of non-claim.⁴ By statute in some states, however, contingent claims such as claims for a stock liability⁵ must be presented. Such statutes

¹⁰ Henry v. Day, 114 Ia. 454; 87 N. W. 416.

¹¹ Manatt v. Reynolds, 114 Ia. 688; 87 N. W. 683.

¹ Baker v. Halleck, 128 Mich. 180; *sub nomine*, Baker v. Stapleton, 87 N. W. 100.

² Easton v. Somerville, 111 Ia. 164; 82 N. W. 475; Pacific, etc., Co. v. Fox, 25 Nev. 229; 59 Pac. 4; Vallentine v. Britten, 127 N. C. 57; 37 S. E. 74; Gardner v. Callaghan, 61 Wis. 91; 20 N. W. 685.

¹ Farris v. Stoutz, 78 Ala. 130; Gleason v. White, 34 Cal. 258; Mackin v. Haven, 187 Ill. 480; 58

N. E. 448; Berryhill v. Peabody, 72 Minn. 232; 75 N. W. 220; South Milwaukee Co. v. Murphy, 112 Wis. 614; 58 L. R. A. 82; 88 N. W. 583.

² Macdonald's Estate, 29 Wash. 422; 69 Pac. 1111.

³ Fitzgerald's Estate v. Bank, 65 Neb. 97; 90 N. W. 994; South Milwaukee Co. v. Murphy, 112 Wis. 614; 58 L. R. A. 82; 88 N. W. 583.

⁴ Morse v. Ry., 191 Ill. 356; 61 N. E. 104; affirming 93 Ill. App. 31.

⁵ Barto v. Stewart, 21 Wash. 605; 59 Pac. 480.

do not apply to claims to the title of specific property.⁶ Such statute does not run against a claim on which a proceeding in appeal operating as a supersedeas was pending.⁷ Whether omission to present a claim against the estate of the principal debtor discharges a surety is a question on which there is a conflict of authority. In some states it is held that the surety is discharged in such cases;⁸ while other states proceed on the theory that the right of the surety against his principal does not come into existence until the surety is obliged to pay what the principal should have paid, and that the surety is therefore not prejudiced by such delay. Accordingly they hold that such failure to present does not discharge the surety.⁹

⁶ *Haven v. Haven*, 181 Mass. 573; 124; 46 N. E. 197; affirming 61
64 N. E. 410; *Rice v. Connelly*, 71 Ill. App. 252; *Siebert v. Quesnel*, 65
N. H. 382; 52 Atl. 446. Minn. 107; 60 Am. St. Rep. 441; 67

⁷ *Ryans v. Boogher*, 169 Mo. 673. N. W. 803.
69 S. W. 1048.

⁹ *Willis v. Chowning*, 90 Tex. 617;
⁸ *Waughop v. Bartlett*, 165 Ill. 59 Am. St. Rep. 842; 40 S. W. 395.

PART IX.

PLACE OF CONTRACT IN LAW.

CHAPTER LXXX.

THE LAW CONTROLLING THE CONTRACT.

§1716. General nature of doctrine.

In the discussion of contracts up to this point, it has been assumed that the question of the law which controls the contract is immaterial. This question may, however, become most eminently material. It is perfectly possible, especially in a country like ours, whose business interests are not in the least bounded by the state lines that confine the jurisdictions of the courts, that parties domiciled in different states may make a contract in another, concerning property situated in a fourth, which contract is to be performed in a fifth and on which suit is brought in a sixth. While it is comparatively rare that so many systems of law compete for the honor of controlling a contract, we must observe that the systems of law which must be regarded as having at least a claim for consideration are (1) the law of the place where either of the parties is domiciled, or both; (2) the law of the place where the property contracted for is situated, either real or personal; (3) the law of the place where the contract takes effect; (4) the law of the place where the contract is to be performed; and (5) the law of the place where the suit is brought. With business transactions running over as wide a territorial range as is common to-day, and with as great diversity in Common Law and above all in statute law, as is often met with, one of two things must happen. Either the court before which the action is brought must ignore all other systems and apply its own; or rules must be worked out for determining under what circumstances each competing system must apply. The former alternative would result in utter confusion. The rights of parties would in many cases depend on the hazard of chance

in determining in what state an action on the contract would be brought. The latter alternative has therefore been adopted by the courts of all nations. For the body of rules by which it is determined what system of law will apply, there are two names in general use, neither appropriate. One is Private International Law — a name given to a subject which is not International Law, and which is no more private than any system of law. The other is Conflict of Laws — a name given to a body of rules which has for its object the avoidance of a conflict of laws. The latter name is probably the more suitable, unless the more accurate, though less concise term,— the Law Controlling a Contract,— is employed. The effect of an adjudication of a foreign court which has jurisdiction to render such adjudication is to be distinguished from the doctrine of the law controlling a contract. Since an adjudication of a court of competent jurisdiction is binding until reversed, even if erroneous, it follows that even if the foreign court applied the wrong system of law its judgment is conclusive.¹ Thus a bill of lading contained a provision exempting the carrier from liability for loss by fire, even if due to its own negligence. The cause of action arose in New Hampshire: New Hampshire law controlled, and by that law such provision was contrary to public policy. Loss by fire occurred through the carrier's negligence. The injured party voluntarily submitted the case to a Canadian court, which decided in favor of the carrier, failing to apply New Hampshire law. It was held in a subsequent suit in New Hampshire that the judgment of the Canadian court was a bar to a subsequent action.²

§1717. What constitutes place of performance.

In determining what system of law controls, it may become necessary to determine in what jurisdiction a contract is to be performed. If no place of performance is fixed by the contract the presumption is that the contract is to be performed where

¹ MacDonald v. R. R., 71 N. H. 448; 93 Am. St. Rep. 550; 59 L. R. A. 448; 52 Atl. 982.

² MacDonald v. R. R., 71 N. H. 448; 93 Am. St. Rep. 550; 59 L. R. A. 448; 52 Atl. 982.

entered into.¹ If but one place of performance is fixed by the contract, and that is fixed absolutely, the place is generally the place of performance.² However, if the real intention of the parties is to perform the contract where made, and another place of performance is fixed in the contract in order to evade a rule of law of the former jurisdiction, the real intention of the parties determines what the place of performance is.³ This principle generally applies in contracts for usurious interest.⁴ If the contract is to be performed, part in one state and part in another, it has been held that the law of each place of partial performance governs such part of the performance as is to be had in that state.⁵ On the other hand, it has been said that if the contract is to be performed in part where made and in part elsewhere, the law of the place where it is to be made and performed in part will control unless the intention of the parties clearly appears to be otherwise.⁶ If the place where the contract is to be performed is optional it is said that the law of the place where the contract was made controls.⁷ This is true especially where the contract is in fact performed there.⁸ Thus an insurance company in one state issued a policy which was delivered in another state. By the terms of the policy the premium was due where the company was domiciled, but there was a provision that "at the pleasure of the company" it would appoint suitable persons to collect premiums elsewhere. Premiums were in fact paid where the policy was delivered. The contract was held to be governed by the law of the state where it was delivered and the premiums were paid.⁹ If the contract

¹ New York, etc., Co. v. Davis, 96 Md. 81; 53 Atl. 669. See § 1715.

² See § 1725.

³ National, etc., Association v. Burch, 124 Mich. 57; 83 Am. St. Rep. 311; 82 N. W. 837.

⁴ Shannon v. Loan Association, 78 Miss. 955; 84 Am. St. Rep. 657; 57 L. R. A. 800; 30 So. 51; Washington Investment Association v. Stanley, 38 Or. 319; 84 Am. St. Rep. 793; 58 L. R. A. 816; 63 Pac. 489;

Building, etc., Association v. Griffin, 90 Tex. 480; 39 S. W. 656.

⁵ Liverpool, etc., Co. v. Ins. Co., 129 U. S. 397.

⁶ Bartlett v. Collins, 109 Wis. 477; 83 Am. St. Rep. 928; 85 N. W. 703.

⁷ Hale v. Navigation Co., 15 Conn. 539; 39 Am. Dec. 398.

⁸ Equitable Life Assurance Society v. Clements, 140 U. S. 226.

⁹ Equitable Life Assurance Society v. Clements, 140 U. S. 226.

is payable at the main office of the lender unless another place is designated, and a place in the state of the borrower's domicile is designated, the law of such state controls as to usury.¹⁰ If no place of performance is designated it has been said that the law of the place where the contract is made controls.¹¹

§1718. What constitutes place of making contract.

In determining what system of law controls, it may become necessary to determine in what jurisdiction a contract is entered into. If the contract is an oral one, made by the parties in person, no difficulty is found, as soon as the facts are established, in determining as a matter of law where the contract was made. So if the contract is in writing, executed by the parties in person and delivered between them, at a personal interview, no difficulty exists as a matter of law in determining where the contract was made. The difficulties presented by this branch of the subject are generally found in one of two classes of cases: (1) where the parties are in different jurisdictions and enter into the contract by correspondence; and (2) where one party to the contract deals with the agent of the adversary party, and the latter party is in another jurisdiction. In many cases both these facts exist in combination. The general rule is the place where the last act is done which is necessary to give the contract validity, is the place of the execution of the contract.¹ Thus if A signs a contract and delivers it to B's agent C, who sends it to B in another county; and B signs it and returns it to C, who delivers it to A, the county where C delivers it to A is the county where such contract is made.² Illustrations of this principle are often found in insurance contracts. If the parties to the insurance contract are in different jurisdictions the place where the last act is

¹⁰ *National, etc., Association v. York, etc., Co. v. Davis*, 96 Md. 81; *Farnham*, 81 Miss. 364; 33 So. 2; 53 Atl. 669.
National, etc., Association v. Hulett,
 — Miss. —; 33 So. 3. ¹ *Ivey v. Land Co.*, 115 Cal. 196;
 46 Pac. 926.

¹¹ Note. *Barrett v. Dodge*, 16 R. ² *Ivey v. Land Co.*, 115 Cal. 196;
 I. 740; 27 Am. St. Rep. 777; 19 Atl. 46 Pac. 926.
 530. Note and mortgage. New

done which is necessary to give validity to the contract is the place where the contract is entered into.³ If the policy is signed by the insurer in one state and the policy is delivered and the premium paid in another, the policy first takes effect in the latter state and the law of such latter state controls in the absence of a provision in the policy showing a contrary intent.⁴ Under such circumstances the law of the domicile of the insurer where such policy was signed does not control as to forfeiture and lapse;⁵ while the law of the state where such policy is delivered and the premium is paid, does control.⁶ On the other hand, if the offer of the insured is accepted⁷ and the policy is mailed to the agent of the insurance company under unconditional orders to him to deliver it to the insured, the agent having no discretion,⁸ or is mailed direct to the insured,⁹ the place of the chief office of the insurer where such offer is thus accepted is the place where such contract is made. A specific provision that premiums were to be paid and losses adjusted at the domicile of the insurer is held to show the intention of the parties to make such domicile the place of performance and hence to make such law control.¹⁰ A note

³ *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262; *Ford v. Ins. Co.*, 6 Bush. (Ky.) 133; 99 Am. Dec. 663; *Galloway v. Ins. Co.*, 45 W. Va. 237; 31 S. E. 969.

⁴ *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262; *Equitable Life Assurance Society v. Clements*, 140 U. S. 226; *Carrollton Furniture Co. v. Indemnity Co.*, 124 Fed. 25; affirming on rehearing, 115 Fed. 77; *Albro v. Ins. Co.*, 119 Fed. 629; *Reliance Mutual Ins. Co. v. Sawyer*, 160 Mass. 413; 36 N. E. 59; *Perry v. Ins. Co.*, 67 N. H. 291; 68 Am. St. Rep. 668; 33 Atl. 731; *Wood v. Ins. Co.*, 8 Wash. 427; 40 Am. St. Rep. 917; 36 Pac. 267.

⁵ *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262.

⁶ *Equitable Life Assurance So-*

ciety v. Clements, 140 U. S. 226.

⁷ *Seamans v. Knapp, etc., Co.*, 89 Wis. 171; 46 Am. St. Rep. 825; 27 L. R. A. 362; 61 N. W. 757.

⁸ *Fidelity Mutual Life Association v. Harris*, 94 Tex. 25; 86 Am. St. Rep. 813; 57 S. W. 635.

⁹ *State Mutual Fire Ins. Association v. Heading Co.*, 61 Ark. 1; 54 Am. St. Rep. 191; 29 L. R. A. 712; 31 S. W. 157; *Commonwealth Mutual Fire Ins. Co. v. Mfg. Co.*, 171 Mass. 265; 50 N. E. 516; *Davis v. Ins. Co.*, 67 N. H. 218; 34 Atl. 464; *Galloway v. Ins. Co.*, 45 W. Va. 237; 31 S. E. 969.

¹⁰ *Franklin Life Ins. Co. v. Galigan*, 71 Ark. 295; 73 S. W. 102; *Fidelity Mutual Life Association v. Harris*, 94 Tex. 25; 86 Am. St. Rep. 813; 57 S. W. 635.

signed in one state and sent to payee in another state,¹¹ or first delivered in another state,¹² or first negotiated in another state,¹³ if accommodation paper,¹⁴ is in effect executed in such other state. So a contract for the sale of intoxicating liquors is made where the order of the vendee is accepted as a finality,¹⁵ even if a prior conditional arrangement to take effect when the vendee should make an order has been made elsewhere.¹⁶ If the contract is made through an agent, and the principal is in another jurisdiction, the question where the contract is made depends upon the authority of the agent, and the manner in which he attempts to bind his principal. If he has authority to bind his principal, and he does so as a finality, the place where he enters into the contract is the place where the contract is made.¹⁷ If, on the other hand, the agent merely transmits orders to his principal which are in effect offers, and the principal accepts them in another state, the contract is considered as made where the principal accepts the offer.¹⁸ This is true even if the adversary party does not know of the limitation on the agent's authority, as long as he is not actively misled.¹⁹ Even if the agent has authority to make a binding contract, but in fact holds the order and has the party who gives the order transmit it direct to his principal in another state and it is accepted there, it is in

¹¹ *Bell v. Packard*, 69 Me. 105; 31 Am. Rep. 251; *Hewitt v. Bank*, 64 Neb. 463; 90 N. W. 250; reversed on rehearing on another point, 64 Neb. 468; 92 N. W. 741. *Contra*, on the theory that if the instrument is sent by mail it takes effect on deposit in the post-office. *Wm. Glenney Glass Co. v. Taylor*, 99 Ky. 24; 34 S. W. 711; *Shoe, etc.*, *Bank v. Wood*, 142 Mass. 563; 8 N. E. 753; *Wayne County Savings Bank v. Law*, 81 N. Y. 566; 37 Am. Rep. 533; *Barrett v. Dodge*, 16 R. I. 740; 27 Am. St. Rep. 777; 19 Atl. 530.

¹² *Hart v. Wills*, 52 Ia. 56; 35 Am. Rep. 255; 2 N. W. 619; *Lawrence v. Bassett*, 5 All. (Mass.) 140; *Johnson, etc.*, *Bank v. Mann*, 94 Tenn. 17; 27 L. R. A. 565; 27 S. W. 1015.

¹³ See § 577 *et seq.*

¹⁴ *Thompson v. Taylor*, 66 N. J. L. 253; 88 Am. St. Rep. 485; 54 L. R. A. 585; 49 Atl. 544; reversing, 65 N. J. L. 107; 46 Atl. 567.

¹⁵ *Bacon v. Hunt*, 72 Vt. 98; 47 Atl. 394.

¹⁶ *Fred Miller Brewing Co. v. De France*, 90 Ia. 395; 57 N. W. 959.

¹⁷ *Taylor v. Pickett*, 52 Ia. 467; 3 N. W. 514; *Erman v. Lehman*, 47 La. Ann. 1651; 18 So. 650.

¹⁸ *Brown v. Wieland*, 116 Ia. 711; 61 L. R. A. 417; 89 N. W. 17; *Sachs v. Garner*, 111 Ia. 424; 82 N. W. 1007; *Engs v. Priest*, 65 Ia. 232; 21 N. W. 580; *Mack v. Lee*, 13 R. I. 293.

¹⁹ *Sachs v. Garner*, 111 Ia. 424; 82 N. W. 1007.

legal effect made in such other state.²⁰ If the application for a loan is sent to the lender's domicile and there accepted, the law of such state controls as to usury.²¹

§1719. Express agreement as to law controlling.

If the parties to a contract have expressly agreed upon the system of law whereby their contract is to be controlled, such provision is ordinarily obligatory, and no room remains for the application of those rules by which this problem is solved in the absence of such express stipulation.¹ Thus such a provision may prevent a contract from being subject to the usury laws which would otherwise apply.² Thus an express reference to the law of the state where a contract is made,³ or where it is made and to be performed in part,⁴ makes the law of such state control as to construction. It is conclusively presumed that the parties know the law of the jurisdiction which they thus adopt.⁵ To this rule there is, however, at least one well

²⁰ *Bacon v. Hunt*, 72 Vt. 98; 47 Atl. 394.

²¹ Even if the land mortgaged to secure such debt is in the state of the borrower's domicile and suit is there brought. *United States, etc., Co. v. Beckley*, 137 Ala. 119; 97 Am. St. Rep. 19; 33 So. 934.

¹ *Spurrier v. La Cloche* (1902), App. Cas. 446; *Royal Exchange Assurance Corporation v. Sjöforsakings Atkiebolaget Vega* (1902), 2 K. B. 384; *Hamlyn v. Talisker Distillery* (1894), A. C. 208; *London Assurance v. Companhia de Moagens*, 167 U. S. 149; *Liverpool, etc., Co. v. Ins. Co.*, 129 U. S. 397; *Mutual Life Ins. Co. v. Hill*, 118 Fed. 708; 55 C. C. A. 536; affirming, 113 Fed. 44; *Mittenthal v. Mascagni*, 183 Mass. 19; 97 Am. St. Rep. 404; 60 L. R. A. 812; 66 N. E. 425; *Russell v. Pierce*, 121 Mich. 208; 80 N. W. 118; *Smith v. Parsons*, 55 Minn. 520; 57 N. W. 311; *Hale v. Cairns*, 8 N. D. 145; 73 Am. St. Rep. 746;

44 L. R. A. 261; 77 N. W. 1010; *Jones v. Trust Co.*, 7 S. D. 122; 63 N. W. 553; *Dugan v. Lewis*, 79 Tex. 246; 23 Am. St. Rep. 332; 14 S. W. 1024; *Griesemer v. Trust Co.*, 10 Wash. 202; 38 Pac. 1031. "It is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own." *London Assurance v. Companhia de Moagens*, 167 U. S. 149, 161.

² *Hale v. Cairns*, 8 N. D. 145; 73 Am. St. Rep. 746; 44 L. R. A. 261; 77 N. W. 1010.

³ *Dugan v. Lewis*, 79 Tex. 246; 23 Am. St. Rep. 332; 14 S. W. 1024.

⁴ *Mittenthal v. Mascagni*, 183 Mass. 19; 97 Am. St. Rep. 404; 60 L. R. A. 812; 66 N. E. 425.

⁵ *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327; reversing, 76 Fed. 617; 22 C. C. A. 425.

recognized exception. If the parties fix the system of law that is to control in order to evade a restriction or prohibition of that system of law which would otherwise control, and this prohibition or restriction has been established for reasons of public policy, the agreement of the parties will be ignored, and that system of law applied which would otherwise control. This rule is generally insisted on when suit is brought in the same jurisdiction as that whose law it is thus sought to evade.⁶

§1720. Presumption as to foreign law.

If there is no evidence as to the law of the state which controls the contract, the question of what that law will be presumed to be is one on which there is some conflict of authority. It has been said that it will be presumed that in such cases the law of the foreign state is the same as the law of the forum. This presumption has been applied to the notice necessary to hold an indorser,¹ and to statutes defining usury.² While most of the cases presented are those in which the basis of the law of the foreign jurisdiction is the Common Law, the same presumption has applied where the law of a foreign country in which the Common Law is not in force is involved.³ Another view is that it will be presumed that the law of the foreign state will be presumed to be the Common Law, which means, of course, the Common Law as the court of the forum interprets it.⁴ Thus it will be presumed that the contract of a married woman domiciled in a foreign state and made there, is void as at Common Law.⁵ Another view that has been expressed is that if some positive provision of statute law, like

⁶ *Cravens v. Ins. Co.*, 148 Mo. 583; 71 Am. St. Rep. 628; 53 L. R. A. 305; 50 S. W. 519; affirmed, *New York Life Ins. Co. v. Cravens*, 178 U. S. 389; *Washington Investment Association v. Stanley*, 38 Or. 319; 84 Am. St. Rep. 793; 63 Pac. 489.

¹ *Second National Bank v. Smith*, 118 Wis. 18; 94 N. W. 664.

² *Mutual, etc., Association v. Worz*, 67 Kan. 506; 73 Pac. 116.

³ *Mittenthal v. Mascagni*, 183 Mass. 19; 97 Am. St. Rep. 404; 60 L. R. A. 812; 66 N. E. 425.

⁴ *Terry v. Robbins*, 128 N. C. 140; 83 Am. St. Rep. 663; 38 S. E. 470.

⁵ *Terry v. Robbins*, 128 N. C. 140; 83 Am. St. Rep. 663; 38 S. E. 470.

usury, is involved, it will be presumed in the absence of proof that the law is such that the contract is valid.⁶

§1721. Attempted generalizations of rule.

The attempt has repeatedly been made to state the rules involved in the subject of conflict of laws in a simple form, substituting a broad generalization for a detailed statement. The original form of simple statement attempted, was that the law of the place where the contract was made was to control.¹ This rule, however, was soon seen to be inexact. The cases in which it was laid down were, many of them, cases in which the place of the making of the contract and the place of performance were the same.² In others, no place of performance was specified; and accordingly the presumption arose that the place of performance was the same place as that at which the contract was entered into.³ If the contract is to be performed where made, the law of that jurisdiction is said to control.⁴ When cases have arisen in which the place of performance was different from the place at which the contract was entered into, it is seen that a blind adherence to the original rule would result in much injustice. The place at which the contract is entered into is often accidental. The place of performance is deliberately selected by the parties. Accordingly it has repeatedly been said that the law of the place of performance

⁶ *Clark v. Eltinge*, 29 Wash. 215; 69 Pac. 736.

¹ *Cox v. United States*, 6 Pet. (U. S.) 172; *Wolf v. Burke*, 18 Colo. 264; 19 L. R. A. 792; 32 Pac. 427; *Brackett v. Norton*, 4 Conn. 517; 10 Am. Dec. 179; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Ford v. Ins. Co.*, 6 Bush. (Ky.) 133; 99 Am. Dec. 663; *Emerson County v. Proctor*, 97 Me. 360; 54 Atl. 849; *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *China Mutual Ins. Co. v. Force*, 142 N. Y. 90; 40 Am. St. Rep. 576; 36 N. E.

874; *Dyke v. Ry.*, 45 N. Y. 113; 6 Am. Rep. 43; *Knowlton v. Ry.*, 19 O. S. 260; 2 Am. Rep. 395.

² *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266; 4 L. R. A. 348; 17 Atl. 405; *Kulp v. Fleming*, 65 O. S. 321; 87 Am. St. Rep. 611; 62 N. E. 334.

³ *Pritchard v. Norton*, 106 U. S. 124; *Lewis v. Headley*, 36 Ill. 433; 87 Am. Dec. 227; *Young v. Harris*, 14 B. Mon. (Ky.) 556; *Toledo First National Bank v. Shaw*, 61 N. Y. 294.

⁴ *Daniels v. Ry.*, 184 Mass. 337; 68 N. E. 337.

controlled as to the validity, nature, obligation and intention.⁵ The same court has changed the general form of expression of this rule repeatedly. Thus the Supreme Court of the United States has said that the law controlling a contract is the law of the place where it is made;⁶ that it is the law of the place of performance;⁷ that the law of the place of performance of the contract regulates matters connected with its performance; while matters bearing upon the execution, interpretation and validity of the contract are determined by the law of the place where it is made;⁸ and this view has in turn been qualified and the law of the place of performance has been held to govern as to validity⁹ or construction.¹⁰ The truth is that the attempt to express the principles involved in a discussion of this subject in the form of a broad, sweeping generalization is an attempt to perform the impossible. It cannot be done except by the arbitrary process of ignoring most of the cases which have been decided, and selecting arbitrarily that limited line which will support the desired general statement. To state the law fairly and accurately requires a much greater detail of statement than any of the rules thus far suggested involve. The different elements in the formation of a contraction, offer and acceptance, consideration, subject-matter, and capacity of the parties, must be considered first; then the separate topics under operation, construction and discharge.

§1722. Law controlling as to offer and acceptance.

Questions of offer and acceptance rarely are involved in the conflict of laws. Possibly this is so because the laws of the

⁵ *Bell v. Bruen*, 1 How. (U. S.) 169; *Andrews v. Pond*, 13 Pet. (U. S.) 65; *Bank v. Daniel*, 12 Pet. (U. S.) 32; *Story on Conflict of Law*, § 280; *Smoot v. Judd*, 161 Mo. 673; 84 Am. St. Rep. 738; 61 S. W. 854; *Heaton v. Eldridge*, 56 O. S. 87; 60 Am. St. Rep. 737; 36 L. R. A. 817; 46 N. E. 638; *Pittsburgh, etc., Co. v. Sheppard* (also styled *Ry. v. Sheppard*), 56 O. S. 68; 60 Am. St. Rep. 732; 46 N. E. 61.

⁶ *Cox v. United States*, 6 Pet. (U. S.) 172.

⁷ *Andrews v. Pond*, 13 Pet. (U. S.) 65; *Bank v. Daniel*, 12 Pet. (U. S.) 32.

⁸ *Scudder v. Bank*, 91 U. S. 406.

⁹ *Bedford v. Loan Association*, 181 U. S. 227.

¹⁰ *London Assurance v. Companhia de Moagens*, 167 U. S. 149.

different states are more in accord upon this subject than on most. Questions of the validity of a contract as far as concerns the form thereof and the method of making it, are controlled by the law of the place where the contract is made.¹ Whether an implied contract exists on the part of a corporation to pay its officers is determined by the law of the place where the services are to be rendered.² Whether the statements made in an application are such that their falsity gives to the insurance company the right to avoid the contract and refund the premiums is determined by the law of the place where the premiums are payable and adjustment to be made.³ Questions of constructive fraud are determined by the law of the place where made and to be performed, and not by the law of the forum. Thus officers of a railroad made a contract in New York to share profits arising from the construction of a local road. The contract was valid at New York law. Subsequently the railroad was consolidated with a Pennsylvania railroad and suit was brought in Pennsylvania. It was held that New York law controlled.⁴

§1723. Form of contract not relating to realty.

The form in which a contract must be executed to be valid is controlled by the law of the place where it is made if the contract does not relate to realty.¹ Thus a statute requiring every insurance policy which refers to the application to have a correct copy thereof annexed, is held not to apply to policies issued by insurance companies in other states on the lives of persons domiciled in the state in which such statute is in force.²

¹ Pritchard v. Norton, 106 U. S. 124; Scudder v. Bank, 91 U. S. 406; Vranex v. Ross, 98 Mass. 591; Galt v. Dibrell, 10 Yerg. (Tenn.) 146.

² Crumlish v. Improvement Co., 38 W. Va. 390; 45 Am. St. Rep. 872; 23 L. R. A. 120; 18 S. E. 456.

³ Fidelity Mutual Life Association v. Harris, 94 Tex. 25; 86 Am. St. Rep. 813; 57 S. W. 635.

⁴ Rumsey v. R. R., 203 Pa. St. 579; 53 Atl. 495.

¹ Pritchard v. Norton, 106 U. S. 124; Vranex v. Ross, 98 Mass. 591; Roubicek v. Haddad, 67 N. J. L. 522; 51 Atl. 938; Galt v. Dibrell, 10 Yerg. (Tenn.) 146.

² Johnson v. Ins. Co., 180 Mass. 407; 63 L. R. A. 833; 62 N. E. 733. So a provision as to forfeiture does not apply to a policy issued by a

In applying this principle, however, there is a divergence of authority as to what matters concern the form of a contract and what concern merely the evidence whereby it is to be proved. The statute of frauds is held in many states to be merely a rule of evidence. Where this view is entertained the law of the forum controls.³ In other states the statute of frauds is held to involve the essential validity of the contract, and to prescribe the form in which the contract must be made. Where this view obtains the law of the forum does not, as such, control. The question then is whether the law of the place where the contract is made or where it is to be performed controls. Most states apply the general principle that the form of the contract is controlled by the law of the place where it is made, and hold that the law of such state controls as to the statute of frauds.⁴ Thus a bill of exchange was drawn in Illinois upon a partnership domiciled in Missouri. It was accepted orally by a member of such firm in Illinois. By the law of Illinois a bill of exchange could be accepted orally. By the statute of frauds of Missouri such oral acceptance was unenforceable. It was held that Illinois law governed.⁵ In other cases the law of the place of performance seems to control. Thus a bill of exchange was drawn in Missouri upon a firm in Illinois. An oral agreement was made in Missouri to accept such bill when presented in Illinois. It was held that Illinois law applied and that such contract was enforceable.⁶ So stamp

foreign corporation. *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262. So a statute which requires contracts for conditional sales to be recorded is held not to apply to contracts of non-residents concerning property without the state. *Hirsch v. Lumber Co.*, 69 N. J. L. 509; 55 Atl. 645.

³ *Leroux v. Brown*, 12 C. B. 801; *Kleeman v. Collins*, 9 Bush. (Ky.) 460; *Emery v. Burbank*, 163 Mass. 326; 47 Am. St. Rep. 456; 28 L. R. A. 57; 39 N. E. 1026; *Heaton v. Eldridge*, 56 O. S. 87; 60 Am. St.

Rep. 737; 36 L. R. A. 817; 46 N. E. 638.

⁴ *Scudder v. Bank*, 91 U. S. 406; *Miller v. Wilson*, 146 Ill. 523; 37 Am. St. Rep. 186; 34 N. E. 1111; *Kling v. Fries*, 33 Mich. 275; *Dacosta v. Davis*, 24 N. J. L. 319; *Wilson v. Mill Co.*, 150 N. Y. 314; 55 Am. St. Rep. 680; 44 N. E. 959; *Perry v. Iron Co.*, 15 R. I. 380; 2 Am. St. Rep. 902; 5 Atl. 632.

⁵ *Scudder v. Bank*, 91 U. S. 406.

⁶ *Hall v. Cordell*, 142 U. S. 116. (Suit was brought in Illinois. The law applied was therefore the law

acts are generally held to affect merely the admissibility in evidence of instruments which do not conform to such statute.⁷ Where this view is taken a contract which does not comply with the stamp acts of the place where made, may be enforced in another jurisdiction.⁸ If, however, the stamp act affects the form of the contract, and makes a contract in violation of the statute invalid and not merely inadmissible in evidence, the contract is unenforceable in other jurisdictions.⁹

§1724. Form of contract relating to realty.

The form of a contract which relates to realty is controlled by the law of the place where the realty is situated.¹ This is in analogy to the principle that the validity of conveyances of realty,² such as deeds³ and mortgages⁴ is determined by the law of the place where the land is situated. Thus the form and validity of a power of attorney to convey realty is controlled by the law of the place where the realty is situated and not the law of the place where the instrument is executed.⁵ So the question whether a covenant of warranty acts as an estoppel is controlled by the law of the place where the land is situated, where the covenant fails of effect because the vendor, a married woman, did not acknowledge the deed and was not examined separately as to her consent to such instrument.⁶ The effect

of the forum. It was not referred as the law of the forum, however, but solely as the law of the place of performance.)

⁷ See § 576.

⁸ *Fant v. Miller*, 17 Gratt. (Va.) 47.

⁹ *Alves v. Hodgson*, 7 T. R. 241; *Satterthwaite v. Doughty*, Busb. (44 N. C.) 314; 59 Am. Dec. 544.

¹ *Dalton v. Taliaferro*, 101 Ill. App. 592; *Bowdle v. Jencks*, — S. D. —; 99 N. W. 98.

² *Post v. Bank*, 138 Ill. 559; 28 N. E. 978; *Swank v. Hufnagle*, 111 Ind. 453; 12 N. E. 303; *Richardson v. De Giverville*, 107 Mo. 422; 28

Am. St. Rep. 426; 17 S. W. 974; *Sell v. Miller*, 11 O. S. 331.

³ *Arndt v. Griggs*, 134 U. S. 316; *Watson v. Holden*, 58 Kan. 657; 50 Pac. 883.

⁴ *Manton v. Seiberling*, 107 Ia. 534; 78 N. W. 194; *People's, etc., Association v. Parish*, 1 Neb. Unofficial 505; 96 N. W. 243; *Baum v. Birchall*, 150 Pa. 164; 30 Am. St. Rep. 797; 24 Atl. 620.

⁵ *Morris v. Linton*, 61 Neb. 537; 85 N. W. 565. (Power of attorney executed in England; land situated in Nebraska.)

⁶ *Smith v. Ingram*, 132 N. C. 959; 95 Am. St. Rep. 680; 61 L. R. A.

of the statute of frauds upon a contract to convey realty is held in many states to be controlled by the law of the state where the realty is situated.⁷ Where this last-mentioned view obtains, an action may be brought upon a contract part in writing and part oral, for conveying realty in a jurisdiction where such contract is enforceable, even if suit is brought in a jurisdiction where such contract could not be enforced.⁸

§1725. Law controlling as to validity of subject-matter.

Whether the subject-matter of a contract is such as to make it valid, or void, or illegal, is a question often presented to the courts for decision. The general rule is that questions of illegality are to be determined by the law of the place of performance, as far as such contracts require performance of acts alleged to be illegal.¹ This principle has been applied to contracts which in their nature are gambling,² contracts to pay to brokers commissions on sales alleged to be gambling,³ and to a contract made in one state to deliver a gambling device in another.⁴ A certificate of deposit was indorsed to secure a gambling debt where such indorsement was valid. Suit was brought where such indorsement was illegal. It was held that the law of the place where such contract was made would con-

878; 44 S. E. 643; affirming on rehearing 130 N. C. 100; 61 L. R. A. 878; 40 S. E. 948.

⁷ Miller v. Wilson, 146 Ill. 523; 37 Am. St. Rep. 186; 34 N. E. 1111; Cochran v. Ward, 5 Ind. App. 89; 51 Am. St. Rep. 229; 29 N. E. 795; 31 N. E. 581; Siegel v. Robinson, 56 Pa. St. 19; 93 Am. Dec. 775; Gates v. Paul, 117 Wis. 170; 94 N. W. 55.

⁸ Gates v. Paul, 117 Wis. 170; 94 N. W. 55.

¹ Price v. Burns, 101 Ill. App. 418; Bigelow v. Burnham, 83 Ia. 120; 32 Am. St. Rep. 294; 49 N. W. 104; Gaylord v. Duryea, 95 Mo. App. 574; 69 S. W. 607; Morris v.

Hockaday, 94 N. C. 286; 55 Am. Rep. 607; Pittsburg, etc., Ry. v. Sheppard, 56 O. S. 68; 60 Am. St. Rep. 732; 46 N. E. 61; Burnett v. R. R., 176 Pa. St. 45; 34 Atl. 972; Hubble v. Land Co., 95 Tenn. 585; 32 S. W. 965.

² Peet v. Hatcher, 112 Ala. 514; 57 Am. St. Rep. 45; 21 So. 711; A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516; 61 S. W. 617; Winward v. Lincoln, 23 R. I. 476; 64 L. R. A. 160; 51 Atl. 106.

³ Gaylord v. Duryea, 95 Mo. App. 574; 69 S. W. 607.

⁴ Price v. Burns, 101 Ill. App. 418.

trol.⁵ A contract of agency with reference to realty to be performed where the realty is situated is invalid everywhere if unenforceable by that law.⁶ Since the place where the contract is made is *prima facie* the place of performance, a note given in Louisiana for Confederate money, held there to be an illegal contract, is unenforceable in Mississippi.⁷ The question whether a warehouseman can issue his own warehouse certificates to himself and pledge them for his own debt is controlled by the law of the place where the property thus pledged is situated.⁸ Under peculiar circumstances the law of the domicile, if also the law of the forum, controls. Thus a man and woman were domiciled in California. She had been divorced within the year, and under California law her marriage was forbidden. They intermarried in another state, where such marriage was lawful. An ante-nuptial contract whereby in consideration of such marriage and of her releasing her interest in his property, he agreed to pay her ten thousand dollars, was held unenforceable in California.⁹ If, however, the act alleged to be illegal has been performed before the contract is entered into, and the liability arising therefrom forms the consideration for the executory agreement, the question of the legality of such transaction is controlled by the law of the place where the transaction takes place.¹⁰

§1726. Special illustrations.—Contract relieving carrier from liability.

The validity of a contract with a common carrier relieving him from his Common-Law liability has been held to be controlled by the law of the state where the property was to be

⁵ Sullivan v. Bank, — Colo. App. —; 70 Pac. 162.

⁶ Alexander v. Barker, 64 Kan. 396; 67 Pac. 829. (Land in the Cherokee Nation.)

⁷ Ivey v. Lalland, 42 Miss. 444; 2 Am. Rep. 606; 97 Am. Dec. 475.

⁸ Swedish - American National Bank v. Bank, 89 Minn. 98; 94 N.

W. 218. (Hence if the warehouses are in different states, some of the contracts of pledge may be valid; others not.)

⁹ Wood v. Wood's Estate, 137 Cal. 148; 69 Pac. 981.

¹⁰ Akers v. Demond, 103 Mass. 318; Winward v. Lincoln, 23 R. I. 476; 64 L. R. A. 160; 51 Atl. 106.

delivered.¹ In other jurisdictions, such a contract is held to be governed by the law of the place where it is made, unless it clearly appears that it was made in view of another system of law.² A statute forbidding carriers to limit their Common-Law liability has been held applicable only to shipments beginning and ending within that state.³ Hence such statute has been held inapplicable to a through shipment into another state, even if the first carrier limited his liability to his own line.⁴ In other jurisdictions the law of the forum seems to have been applied on the ground of public policy.⁵ Another view expressed is that such a provision, if contrary to the law of the forum, will not be enforced, since it is contrary to the public policy of such jurisdictions.⁶ It has also been held that the law of the state where the loss occurs and the suit is brought should control.⁷

§1727. Usurious contracts.

Usurious contracts are declared to be so by positive statute, which generally makes specific provision for the extent to which the money loaned can be recovered. Such a contract, if valid where made, may be enforced in jurisdictions where such a contract would be treated as usurious.¹ If no place of payment

¹ *Pittsburg, etc., Co. v. Sheppard*, 56 O. S. 68; 60 Am. St. Rep. 732; 46 N. E. 61. (Suit was brought in the same state.)

² *Central of Georgia R. R. v. Kavanaugh*, 92 Fed. 56; *Brockway v. Express Co.*, 171 Mass. 158; 50 N. E. 626; 168 Mass. 257; 47 N. E. 87; *Meuer v. Ry.*, 11 S. D. 94; 74 Am. St. Rep. 774; 75 N. W. 823. (Even if one of the parties resided in another state.) *Meuer v. Ry.*, 5 S. D. 568; 49 Am. St. Rep. 898; 25 L. R. A. 81; 59 N. W. 945; *Davis v. Ry.*, 93 Wis. 470; 57 Am. St. Rep. 935; 33 L. R. A. 654; 67 N. W. 16, 1132.

³ *Missouri Pacific Ry. v. Sherwood*, 84 Tex. 125; 17 L. R. A. 643; 19 S. W. 455.

⁴ *Missouri Pacific Ry. v. Sherwood*, 84 Tex. 125; 17 L. R. A. 643; 19 S. W. 455.

⁵ *The Kensington*, 183 U. S. 263; *Chicago, etc., R. R. v. Gardiner*, 51 Neb. 70; 70 N. W. 508.

⁶ *The Kensington*, 183 U. S. 263. *Contra*, *Fonseca v. Steamship Co.*, 153 Mass. 553; 25 Am. St. Rep. 660; 12 L. R. A. 340; 27 N. E. 665; *Knowlton v. Ry.*, 19 O. S. 260; 2 Am. Rep. 395.

⁷ *Hughes v. R. R.*, 202 Pa. St. 222; 97 Am. St. Rep. 713; 63 L. R. A. 513; 51 Atl. 990 (affirmed for want of a Federal question, *Pennsylvania R. R. v. Hughes*, 191 U. S. 477).

¹ *Crebbin v. Deloney*, 70 Ark. 493; 69 S. W. 312.

is fixed the law of the state where the notes are executed and delivered will control.² If no place of payment is provided for in the note it is controlled by the law of the place where it is made, even if the by-laws of the payee loan association require all payments to be made at the home office.³ If a contract is made in one state and is payable in another, the parties may, if acting in good faith, contract with reference to the interest laws of either state, and a rate of interest, valid under either system of law will not be regarded as usurious.⁴ *Prima facie*, therefore, if the rate contracted for is valid by the law of the place of performance the contract is not usurious.⁵ Hence a contract made in Pennsylvania between a citizen of that state and a building and loan association domiciled in New York, payable in New York, has been held to be governed by New York law.⁶ This is true especially if the law of the place of

² New York, etc., Co. v. Davis, 96 Md. 81; 53 Atl. 669.

³ Spinney v. Chapman, 121 Ia. 38; 95 N. W. 230.

⁴ Hieronymus v. Loan Association, 107 Fed. 1005; 46 C. C. A. 684; affirming 101 Fed. 12; United States, etc., Co. v. Beckley, 137 Ala. 119; 97 Am. St. Rep. 19; 33 So. 934; Barrett v. Loan Association, 130 Ala. 294; 30 So. 347; Pioneer, etc., Co. v. Nonnemacher, 127 Ala. 521; 30 So. 79; Jackson v. Mortgage Co., 88 Ga. 756; 15 S. E. 812; Scott v. Perlee, 39 O. S. 63; 48 Am. Rep. 421; British, etc., Co. v. Bates, 58 S. C. 551; 36 S. E. 917; Thornton v. Dean, 19 S. C. 583; 45 Am. Rep. 796; Dugan v. Lewis, 79 Tex. 246; 12 L. R. A. 93; 14 S. W. 1024; Ware v. Investment Co., 95 Va. 680; 64 Am. St. Rep. 826; 29 S. E. 744. "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance and if the interest

allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate." Andrews v. Pond, 13 Pet. (U. S.) 65, 77; quoted in Miller v. Tiffany, 1 Wall. (U. S.) 298, 310; and in Bedford v. Loan Association, 181 U. S. 227, 242.

⁵ Hayes v. Loan Association, 124 Ala. 663; 82 Am. St. Rep. 216; 26 So. 527; Central National Bank v. Cooper, 85 Mo. App. 383; People's, etc., Association v. Berlin, 201 Pa. St. 1; 88 Am. St. Rep. 764; 50 Atl. 308; Pioneer, etc., Loan Co. v. Cannon, 96 Tenn. 599; 54 Am. St. Rep. 858; 33 L. R. A. 112; 36 S. W. 386.

⁶ People's, etc., Association v.

payment and the law of the forum are the same.⁷ Hence if valid where payment is to be made, a contract is not usurious, even though if controlled by the law of the place where such borrower is domiciled it would be usurious.⁸ On the other hand, a contract valid where made may be enforced in another state, even if usurious by the law of such state.⁹ If, however, the building and loan association is really domiciled in the state where the loan is given and the maker resides, and the real intention of the parties is that it shall be paid there, a formal provision making the loan payable at the chief office of the company in another state does not make the law of such latter state control.¹⁰ Establishing a local agent in a state other than the one in which the corporation has its main office is for this purpose held to give it a domicile in that state.¹¹ If the contract is not usurious by the law of the place where the debt is payable, a mortgage given to secure it in a state by the law of which such rate of interest would be usurious, is valid and may be enforced there.¹² Even if the makers are domiciled in one state, the realty mortgaged to secure the note is situated there, and the note is delivered there, the note will be valid if not usurious by the law of the place of payment.¹³ By statute

Berlin, 201 Pa. St. 1; 88 Am. St. Rep. 764; 50 Atl. 308. So if a building and loan association note is payable at the home office, the law of the domicile of such association controls. Pacific States, etc., Association v. Green, 123 Fed. 43; Interstate, etc., Association v. Hotel Co., 120 Fed. 422; Alexander v. Loan Association, 120 Fed. 963; Gale v. Loan Association, 117 Fed. 732.

⁷ Middle States, etc., Co. v. Baker, 19 App. D. C. 1.

⁸ Hieronymus v. Loan Association, 101 Fed. 12; affirmed 107 Fed. 1005; 46 C. C. A. 684.

⁹ American, etc., Association v. McClellan, — Ark. —; 70 S. W. 463; Farmers', etc., Co. v. Bazore, 67 Ark. 252; 54 S. W. 339.

¹⁰ Vermont, etc., Co. v. Hoffman, 5 Ida. 376; 95 Am. St. Rep. 186; 37 L. R. A. 509; 49 Pac. 314; Hoskins v. Loan Association, — Mich. —; 95 N. W. 566; Georgia, etc., Association v. Shannon, 80 Miss. 642; 31 So. 900; Shannon v. Loan Association, 78 Miss. 955; 84 Am. St. Rep. 657; 57 L. R. A. 800; 30 So. 51.

¹¹ National, etc., Association v. Brahan, 80 Miss. 407; 57 L. R. A. 793; 31 So. 840.

¹² Bedford v. Loan Association, 181 U. S. 227; Central National Bank v. Cooper, 85 Mo. App. 383.

¹³ Hamilton v. Fowler, 99 Fed. 18; 40 C. C. A. 47.

a contract may be made valid, even if exceeding the legal rate in the state where made, if valid by the law of the state where the property mortgaged to secure such debt is situated.¹⁴ If a loan for the purpose of buying up liens is not usurious where the lender is domiciled nor where the liens are to be purchased it is valid though usurious where made.¹⁵ If the defense of usury could not be interposed under the laws of either state, the question of which law controls is, of course, immaterial.¹⁶

§1728. Sales of intoxicating liquors.

Cases concerning the sale of intoxicating liquors often involve the topic of the conflict of laws. In discussing this topic an important distinction is to be noted. There are cases involving the sale of intoxicating liquors, which are confessedly governed by the law of a state where such sales are legal, which are nevertheless held to be illegal because intended to aid in the violation of the law of another state.¹ With this principle we have nothing to do here. The question to be considered in this connection is solely whether the law of the state in which such sale is legal, or that in which such sale is illegal, controls. The general rule is that the law of the state where the title of the property passes from the vendor to the vendee controls.² This is ordinarily the place of delivery of the property.³ Hence if such sales are made where valid and title passes, the fact that the vendor acting for vendee delivers the liquor to a common carrier for transportation to a state where such sale is invalid does not make the law of the latter state control.⁴ So if intoxicating liquor is to be delivered by the

¹⁴ *Kendrick v. Kyle*, 78 Miss. 278; 38 So. 951.

¹⁵ *Kroegher v. Colonization Co.*, 119 Fed. 641.

¹⁶ *Binghamton Trust Co. v. Auten*, 68 Ark. 299; 82 Am. St. Rep. 295; 57 S. W. 1105.

¹ See § 532.

² *J. & J. Eager Co. v. Burke*, 74 Conn. 534; 51 Atl. 544; *Fred Miller Brewing Co. v. De France*, 90 Ia.

395; 57 N. W. 959; *Portsmouth Brewing Co. v. Smith*, 155 Mass. 100; 28 N. E. 1130; *P. Schoenhofen Brewing Co. v. Whipple* (Neb.), 89 N. W. 751; *Bacon v. Hunt*, 72 Vt. 98; 47 Atl. 394.

³ *Lewis v. McCabe*, 49 Conn. 141; 44 Am. Rep. 217; *Weil v. Golden*, 141 Mass. 364; 6 N. E. 229.

⁴ *Brown v. Wieland*, 116 Ia. 711; 61 L. R. A. 417; 89 N. W. 17;

vendor free on board in Wisconsin where such contract is legal, the fact that it is to be shipped into Iowa where such contract is illegal does not make such contract illegal.⁵ On the other hand, if by the contract between the parties delivery is to be made to the vendee at his domicile, the vendor causing the goods to be transported to that place by a carrier the law of such place controls.⁶ If a conditional agreement for a sale is made in one state, to become a binding contract only when the prospective vendee shall make an order, a sale made subsequently in another state pursuant to such order is controlled by the law of the latter state and not that of the former.⁷ So if an order for intoxicating liquors is solicited by an agent where such contract is illegal, but does not become a binding contract until acceptance by the principal of the agent where such contract is legal, the law of the latter state controls and the contract is legal.⁸ This principle applies where the order is given direct to the agent and under his direction it is held until the vendee sends in his order direct to the vendor,⁹ and to cases where the vendee does not know that the agent has no authority to make a binding contract as long as neither the agent nor his principal attempt to mislead him.¹⁰ In some jurisdictions the act of sending an agent into the state where the resale of intoxicating liquors is unlawful is held to be such aid to the illegal intent as to make the original sale illegal.¹¹ As said before,¹² this rule does not involve the question of the

Engs v. Priest, 65 Ia. 232; 21 N. W. 580; *Sullivan v. Sullivan*, 70 Mich. 583; 38 N. W. 472; *Bollinger v. Wilson*, 76 Minn. 262; 77 Am. St. Rep. 646; 79 N. W. 109.

⁵ *Bollinger v. Wilson*, 76 Minn. 262; 77 Am. St. Rep. 646; 79 N. W. 109.

⁶ *Weil v. Golden*, 141 Mass. 364; 6 N. E. 229.

⁷ *Fred Miller Brewing Co. v. De France*, 90 Ia. 395; 57 N. W. 959.

⁸ *J. & J. Eager Co. v. Burke*, 74 Conn. 534; 51 Atl. 544; *Brown v. Wieland*, 116 Ia. 711; 61 L. R. A.

417; 89 N. W. 17; *Sachs v. Garner*, 111 Ia. 424; 82 N. W. 1007; *Fegler v. Shipman*, 33 Ia. 194; 11 Am. Rep. 118; *Bacon v. Hunt*, 72 Vt. 98; 47 Atl. 394.

⁹ *Bacon v. Hunt*, 72 Vt. 98; 47 Atl. 394.

¹⁰ *Sachs v. Garner*, 111 Ia. 424; 82 N. W. 1007.

¹¹ *Backman v. Wright*, 27 Vt. 187; 65 Am. Dec. 187; *McConihe v. McMann*, 27 Vt. 95. So by statute in Iowa. *Tolman v. Johnson*, 43 Ia. 127.

¹² See *ante*, this section.

law controlling. When the original Interstate Commerce Law was in force a contract appointing an agent to sell intoxicating liquors in the original package was valid even in states where such sale in general was forbidden,¹³ since a state could not forbid the importation of articles of interstate commerce,¹⁴ and the state statutes to that effect were therefore unconstitutional. Under the "Wilson act" which provides that liquors transported into any state shall on arrival there be subject to its laws, and shall not be exempt because in the original package, it has been held that if orders are taken in one state, and the vendor ships such liquor in from another state the law of the former state determines his rights.¹⁵

§1729. Contract in violation of policy of law of forum not enforced.

One important qualification to the general doctrine that the place of performance controls as to the validity of the subject-matter is found where the contract is sought to be enforced in a forum to the morals and policy of which the contract is antagonistic.¹ Thus courts have refused to enforce a wager

¹³ *Green v. Brewing Co.*, 103 Ia. 252; 72 N. W. 655; *Carstairs v. O'Donnell*, 154 Mass. 357; 28 N. E. 271; *Richards v. Woodward*, 113 Mass. 285; *Durkee v. Moses*, 67 N. H. 115; 23 Atl. 793; overruling *Dunbar v. Locke*, 62 N. H. 442; *Jones v. Surprise*, 64 N. H. 243; 9 Atl. 384.

¹⁴ *Lyng v. Michigan*, 135 U. S. 161; *Leisy v. Hardin*, 135 U. S. 100.

¹⁵ *Bluthenthal v. McWhorter*, 131 Ala. 642; 31 So. 559.

¹ *Kennett v. Chambers*, 14 How. (U. S.) 38; *Smith v. Bank*, 5 Pet. (U. S.) 518; *Parker v. Moore*, 111 Fed. 470; *Benton v. Singleton*, 114 Ga. 548; 58 L. R. A. 181; 40 S. E. 811; *Rhodes v. Savings Co.*, 173 Ill. 621; 42 L. R. A. 93; 50 N. E. 998;

Pope v. Hanke, 155 Ill. 617; 28 L. R. A. 568; 40 N. E. 839; *Rogers v. Rains*, 100 Ky. 295; 38 S. W. 483; *American, etc., Co. v. Jefferson*, 69 Miss. 770; 30 Am. St. Rep. 587; 12 So. 464; *True v. Ranney*, 21 N. H. 52; 53 Am. Dec. 164; *Varnum v. Camp*, 13 N. J. L. 326; 25 Am. Dec. 476; *Dearing v. Hardware Co.*, 165 N. Y. 78; 80 Am. St. Rep. 708; 58 N. E. 773; *Despard v. Churchill*, 53 N. Y. 192; *Armstrong v. Best*, 112 N. C. 59; 34 Am. St. Rep. 473; 25 L. R. A. 188; 17 S. E. 14; *Winward v. Lincoln*, 23 R. I. 476; 64 L. R. A. 160; 51 Atl. 106; *Welling v. Loan Association*, 56 S. C. 280; 34 S. E. 409; *Ex parte Dickinson*, 29 S. C. 453; 1 L. R. A. 685; 13 Am. St. Rep. 749; 7 S. E. 593; *Pennegar v. State*, 87 Tenn. 244;

contract, though valid where it is to be performed.² Thus a note given in renewal of a note given to pay a bet on a race,³ or a note on gambling consideration, enforceable in the hands of a *bona fide* holder where given,⁴ even though valid where given and payable, has been held unenforceable in an action brought in a jurisdiction where such contracts are illegal. So equity has refused to enforce a foreign judgment rendered on a wager in a jurisdiction where a wager was lawful, even though the illegal character of the transaction was not set up as a defense.⁵ So a contract to aid in divorce, even if valid where made, will not be enforced in another jurisdiction where against public policy.⁶

§1730. Capacity of parties.—Married women.

Questions of the capacity of the parties to a contract are said by many courts to be determined by the law of the place where the contract is made.¹ Under this subject by far the most numerous class of cases concern contracts of married women. This is probably because there is far greater difference in the law of the different states on the question of a married woman's capacity to make contracts than on any other topic of capacity. There are four inconsistent theories as to the law controlling the capacity of a married woman to bind herself by contract. (1) The capacity of a married woman to bind herself by contract is governed by the law of the place where the contract is made,² unless by the law of place of her domicile she lacks

10 Am. St. Rep. 648; 2 L. R. A. 703; 10 S. W. 305; Palmer v. Palmer, 26 Utah 31; 61 L. R. A. 641; 72 Pac. 3; Bartlett v. Collins, 109 Wis. 477; 83 Am. St. Rep. 928; 85 N. W. 703.

² Parker v. Moore, 115 Fed. 799; reversing 111 Fed. 470; Pope v. Hanke, 155 Ill. 617; 28 L. R. A. 568; 40 N. E. 839; Sondheim v. Gilbert, 117 Ind. 71; 10 Am. St. Rep. 23; 5 L. R. A. 432; 18 N. E. 687; Minzesheimer v. Doolittle, 60 N. J. Eq. 394; 45 Atl. 611.

³ Gooch v. Faucett, 122 N. C. 270; 39 L. R. A. 835; 29 S. E. 362.

⁴ Pope v. Hanke, 155 Ill. 617; 28 L. R. A. 568; 40 N. E. 839.

⁵ Minzesheimer v. Doolittle, 60 N. J. Eq. 394; 45 Atl. 611.

⁶ Palmer v. Palmer, 26 Utah 31; 61 L. R. A. 641; 72 Pac. 3.

¹ Union National Bank v. Chapman, 169 N. Y. 538; 88 Am. St. Rep. 614; 57 L. R. A. 513; 62 N. E. 672.

² Nixon v. Halley, 78 Ill. 611; Brown v. Dalton, 105 Ky. 669; 88

capacity entirely.³ Accordingly, the contract of a married woman, valid at her domicile where made will be enforced in another jurisdiction by the law of which she has no capacity to contract.⁴ In some of these cases the contract is made at the domicile of the married woman and is to be performed there. If valid there, it is enforced in other states, though if made at the state of the forum it would be void.⁵ It must be observed that the place where the contract is made is not the place where it is signed, but where it takes effect.⁶ Accordingly, if a married woman signs a contract in the state of her domicile and delivers it in another state, the latter is the place where the contract is made and under this doctrine its laws will control.⁷ A note was executed in form by a husband to his wife, and indorsed by her as accommodation indorser in New Jersey, where she had no power to contract with her husband. She knew that it was to be negotiated in New York, where such contract was valid. It was in fact negotiated there, and there first went into effect. It was held that she was liable on such contract in New Jersey.⁸ A married woman domiciled in

Am. St. Rep. 325; 49 S. W. 443; Baer v. Terry, 108 La. 597; 92 Am. St. Rep. 394; 51 L. R. A. 417; 32 So. 353; State Bank v. Maxson, 123 Mich. 250; 81 Am. St. Rep. 196; 82 N. W. 31; Benton v. Bank, 45 Neb. 850; 64 N. W. 227; Thompson v. Taylor, 66 N. J. L. 253; 88 Am. St. Rep. 485; 54 L. R. A. 585; 49 Atl. 544; reversing 65 N. J. L. 107; 46 Atl. 567; Union National Bank v. Chapman, 169 N. Y. 538; 88 Am. St. Rep. 614; 57 L. R. A. 513; 62 N. E. 672; Wood v. Wheeler, 111 N. C. 231; 16 S. E. 418; Evans v. Cleary, 125 Pa. St. 204; 11 Am. St. Rep. 886; 17 Atl. 440; Robinson v. Queen, 87 Tenn. 445; 10 Am. St. Rep. 690; 3 L. R. A. 214; 11 S. W. 38; Dulin v. McCaw, 39 W. Va. 721; 20 S. E. 681; Young v. Hart, 101 Va. 480; 44 S. E. 703.

³ Young v. Hart, 101 Va. 480; 44 S. E. 703. See *post*, this section.

⁴ Marks v. Bank, 110 La. 659; 34 So. 725.

⁵ Gibson v. Sublett, 82 Ky. 596; Wright v. Remington, 41 N. J. L. 48; 32 Am. Rep. 180; Robinson v. Queen, 87 Tenn. 445; 10 Am. St. Rep. 690; 3 L. R. A. 214; 11 S. W. 38; Dulin v. McCaw, 39 W. Va. 721; 20 S. E. 681.

⁶ See § 1717.

⁷ Bell v. Packard, 69 Me. 105; 31 Am. Rep. 251; Milliken v. Pratt, 125 Mass. 374; 28 Am. Rep. 241; Thompson v. Taylor, 66 N. J. L. 253; 88 Am. St. Rep. 485; 54 L. R. A. 585; 49 Atl. 544; reversing 65 N. J. L. 107; 46 Atl. 567.

⁸ Thompson v. Taylor, 66 N. J. L. 253; 88 Am. St. Rep. 485; 54 L. R. A. 585; 49 Atl. 544; reversing 65 N. J. L. 107; 46 Atl. 567.

Alabama signed a note there as surety for her husband. The note was payable in Illinois and suit thereon was brought in New York. In Alabama she had no authority to act as surety for her husband; in Illinois, she had. The majority of the court found from the record that, though the note was intended by the makers to be negotiated in Illinois, the married woman did not know of such intention; and accordingly held that her capacity was to be determined by Alabama law. A dissenting opinion held that Illinois law should govern, on the ground that the record showed that she knew of such intention.⁹ A married woman, domiciled in Kentucky, accepted a conveyance there from her husband in which she assumed a note given for the purchase money. By the law of Kentucky where the Common-Law rule was in force, a husband could not contract with his wife. The realty was situated in Virginia, by the law of which state a husband could contract with his wife. In a suit against her on the note in Kentucky it was held that the law of Kentucky controlled as to her capacity; and that accordingly she was not personally liable.¹⁰ A married woman delivered notes in Missouri, where she was domiciled, as security for her husband to pay for certain mules. In Missouri she had power to bind her separate estate by a contract not made for the benefit thereof. In Louisiana she had no such power. In a suit on the notes in Louisiana, it was held that Missouri law governed and that the notes were valid.¹¹ It has been suggested that the validity of a note given by a married woman to discharge a pre-existing liability is controlled by the law of the place where such liability was incurred and not by the law of the place where such note is given. A married woman signed a bond in Ohio as surety where she could thus bind herself. Subsequently in Indiana where she could not thus bind herself, she gave a note in discharge of such liability. The note was

⁹ *Union National Bank v. Chapman*, 119 N. Y. 538; 88 Am. St. Rep. 614; 51 L. R. A. 513; 62 N. E. 672.
¹⁰ *Brown v. Dalton*, 105 Ky. 669; 88 Am. St. Rep. 325; 49 S. W. 443.

¹¹ *Baer v. Terry*, 108 La. 597; 92 Am. St. Rep. 394; 32 So. 353. (A previous suit for the value of the mules had failed. 105 La. 479; 29 So. 886.)

held valid.¹² The qualification already suggested, that the married woman must not be totally disqualified by the law of her domicile, needs comment. This negative proposition is too broad and cannot safely be converted into an affirmative proposition. A narrower principle, however, will go far toward reconciling the differences of opinion. If the policy of the law of a married woman's domicile forbids her from binding herself by contract, and an attempt is made to enforce in the forum of her domicile, the principle that no court can be required by comity to enforce a contract which is contrary to its own public policy,¹³ has been invoked to prevent the enforcing of such contract.¹⁴ Since this rule does not involve the liability of the married woman, but solely the policy of the law of the forum, a change in the policy of the law between the time that the contract is made and the time that action is brought, will make such contract enforceable in the forum of her domicile.¹⁵ Further, this principle cannot protect a married woman who makes a contract at her domicile where it is valid, and subsequently removes her domicile to a state where such contract is invalid.¹⁶ While this principle will reconcile many cases apparently contradictory, it is not adopted uniformly. The rule that the contract of a married woman if valid where made will be enforced everywhere has been applied by some courts even to cases where the contract was sought to be enforced in the forum within which the married woman was domiciled and by the law of which she had no capacity to make contracts.¹⁷ (2) The law of the domicile controls as to the

¹² *Robison v. Pease*, 28 Ind. App. 610; 63 N. E. 479.

¹³ See § 1729.

¹⁴ *Freeman's Appeal*, 68 Conn. 533; 57 Am. St. Rep. 112; 37 L. R. A. 452; 37 Atl. 420; *Hanover National Bank v. Howell*, 118 N. C. 271; 23 S. E. 1005; *Armstrong v. Best*, 112 N. C. 59; 34 Am. St. Rep. 473; 25 L. R. A. 188; 17 S. E. 14; *First National Bank v. Shaw*, 109 Tenn. 237; 97 Am. St. Rep. 840; 70 S. W. 807.

¹⁵ *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241; *Case v. Dodge*, 18 R. I. 661; 29 Atl. 785.

¹⁶ *Taylor v. Sharp*, 108 N. C. 377; 13 S. E. 138.

¹⁷ *First National Bank v. Mitchell*, 92 Fed. 565 (involving the same parties and the same transaction as *Freeman's Appeal*, 68 Conn. 533; 57 Am. St. Rep. 112; 37 L. R. A. 452; 37 Atl. 420. and directly contrary thereto); *Thompson v. Taylor*, 66 N. J. L. 253; 88 Am. St. Rep.

capacity of a married woman to make a contract even if it is executed elsewhere.¹⁸ Thus a note was signed in Tennessee by a married woman there domiciled. It was delivered in Ohio and there payable. By the law of Ohio she had capacity to bind herself. By the law of Tennessee she did not. Suit was brought in Tennessee. It was held that her capacity was determined by Tennessee law.¹⁹ (3) Other courts hold that the law of the place of performance governs.²⁰ (4) It has been suggested that the law of the forum controls.²¹ There is, however, no reason and but little authority in this view. (5) The foregoing contracts concern personal liability or personal property. Different principles usually control conveyances of realty or contracts affecting it. By reason of this difference in subject-matter neither of the theories on this subject, though inconsistent with each other, can properly be said to be inconsistent with any of the foregoing. The two theories upon this subject are as follows: (a) The capacity of a married woman to deal with her realty and to contract concerning it is controlled by the law of the place where the realty is situated.²² Thus the validity of a sale of realty by a husband to his wife,²³ or a mortgage given by her in one state on land situated in another,²⁴ are each controlled by the law of the state where the land is situated. From the nature of actions concerning realty this is necessarily the law of the forum, as well. So the law of the place where the realty is situated and the suit is brought controls as to the validity of a contract whereby a married woman seeks to charge her separate estate.²⁵ So the validity

485; 54 L. R. A. 585; 49 Atl. 544; reversing 65 N. J. L. 107; 46 Atl. 567.

¹⁸ First National Bank v. Shaw, 109 Tenn. 237; 97 Am. St. Rep. 840; 59 L. R. A. 498; 70 S. W. 807.

¹⁹ First National Bank v. Shaw, 109 Tenn. 237; 97 Am. St. Rep. 840; 59 L. R. A. 498; 70 S. W. 807.

²⁰ Smoot v. Judd, 161 Mo. 673; 84 Am. St. Rep. 738; 61 S. W. 854.

²¹ Hayden v. Stone, 13, R. I. 106.

²² Cochran v. Benton, 126 Ind. 58; 25 N. E. 870; Rush v. Landers, 107 La. 549; 57 L. R. A. 353; 32 So. 95.

²³ Rush v. Landers, 107 La. 549; 57 L. R. A. 353; 32 So. 95.

²⁴ Cochran v. Benton, 126 Ind. 58; 25 N. E. 870; Swank v. Hufnagle, 111 Ind. 453; 12 N. E. 303.

²⁵ Thompson v. Kyle, 39 Fla. 582; 63 Am. St. Rep. 193; 23 So. 12; Shacklett v. Polk, 51 Miss. 378;

of a note and mortgage executed to bind the separate estate of a married woman for her husband's debt at her domicile, where she has no such power,²⁶ is controlled by the law of the place where the realty is situated; even if it is given to secure her liability as surety which is void where the contract is made.²⁷

(b) A minority of the courts hold that in contracts concerning realty the law of the domicile controls if the contract is made there.²⁸ A married woman domiciled in North Carolina executed a covenant there whereby she released dower in realty in Massachusetts. By statute in North Carolina, after complying with the statute, she acquired capacity as a free trader to bind herself by contract. It was held that North Carolina law applied.²⁹ As pointed out in the dissenting opinion filed in the last case, this leads to the remarkable result that a contract for realty may be enforced specifically when if the contract had been performed and the conveyance made, the contract would have been void. A minority of the courts also hold that a contract whereby a married woman seeks to charge here separate estate is to be controlled by the law of the place where made.³⁰ A married woman, domiciled in Kansas indorsed her husband's note there. In Kansas she had power to charge her separate estate at law. She owned realty in Michigan, by the law of which state she did not have such power. Suit was brought on such note in Michigan. It was held that her capacity was controlled by Kansas law.³¹

Wick v. Dawson, 42 W. Va. 43; 24 S. E. 587.

²⁶ Thompson v. Kyle, 39 Fla. 582; 63 Am. St. Rep. 193; 23 So. 12.

²⁷ Frierson v. Williams, 57 Miss. 451. *Contra*, Evans v. Beaver, 50 O. S. 190; 40 Am. St. Rep. 666; 33 N. E. 643.

²⁸ Polson v. Stewart, 167 Mass. 211; 57 Am. St. Rep. 452; 36 L. R. A. 771; 45 N. E. 737; Wood v. Wheeler, 111 N. C. 231; 16 S. E. 418.

²⁹ Polson v. Stewart, 167 Mass. 211; 57 Am. St. Rep. 452; 36 L. R. A. 771; 45 N. E. 737.

³⁰ State Bank v. Maxson, 123 Mich. 250; 81 Am. St. Rep. 196; 82 N. W. 31; Merrielles v. State Bank, 5 Tex. Civ. App. 483; 24 S. W. 564.

³¹ State Bank v. Maxson, 123 Mich. 250; 81 Am. St. Rep. 196; 82 N. W. 31.

§1731. Effect of contract.—Assignability.

The effect of an assignment, if valid, is controlled by the law of the place where it is made.¹ Thus the question whether a wife acquires an absolute interest in an insurance policy on her husband's life by assignment from him,² or whether an implied warranty of validity exists in a sale of bonds,³ is determined in each case by the law of the place where the contract is made. In many of the cases where this rule is laid down, the assignor was domiciled where the assignment was made.⁴ Assignment of contract rights may be forbidden by law on two different theories. (1) The nature of the contract assigned may itself prevent assignment. Whether an assignment is valid or invalid for a reason of this sort depends on the law of the place which controls the contract sought to be assigned.⁵ Thus a life insurance policy was executed in New York, and there payable. The insured was domiciled in Massachusetts, and there assigned such policy to his wife. It was held that New York law controlled as to whether the assignment had any validity.⁶ (2) The relic of the Common-Law rule forbidding assignments still prevents an assignee of a contract from suing in his own name in some states. In this form the rule is a mere matter of procedure, and concerns the remedy only. If this is the effect of the rule, the law of the forum controls.⁷

¹ Colburn's Appeal, 74 Conn. 463; 92 Am. St. Rep. 231; 51 Atl. 139; Succession of Miller v. Ins. Co., 110 La. 652; 34 So. 723; May v. Wannenmacher, 111 Mass. 202; *In re Dalpay*, 41 Minn. 532; 16 Am. St. Rep. 729; 6 L. R. A. 108; 43 N. W. 564; Allen v. Bain, 2 Head. (Tenn.) 100.

² Colburn's Appeal, 74 Conn. 463; 92 Am. St. Rep. 231; 51 Atl. 139.

³ Meyer v. Richards, 163 U. S. 385.

⁴ Davis v. Mills, 99 Fed. 39; Colburn's Appeal, 74 Conn. 463; 92 Am. St. Rep. 231; 51 Atl. 139; Consolidated, etc., Co. v. Collier, 148 Ill.

259; 39 Am. St. Rep. 181; 35 N. E. 756.

⁵ Colburn's Appeal, 74 Conn. 463; 92 Am. St. Rep. 231; 51 Atl. 139.

⁶ Colburn's Appeal, 74 Conn. 463; 92 Am. St. Rep. 231; 51 Atl. 139. (Massachusetts law, however, controls as to the effect of such assignment—i. e., whether by such assignment the wife acquired the entire interest in such policy.)

⁷ Leach v. Greene, 116 Mass. 534. *Contra*, that the law of the place where the assignment is made controls. Lanigan v. North, 69 Ark. 62; 63 S. W. 62.

§1732. Negotiability.

Questions of the negotiability of a contract are determined by the law of the place where the contract is made if there to be performed.¹ If to be performed in a different jurisdiction from that where made, the law of the place of performance controls.² Upon this question there is, however, a divergence of authority. Some courts hold that the question of negotiability is determined by the law of the place where the contract is made.³ The law of the place of performance controls as to what constitutes a *bona fide* holder.⁴ Thus in New Hampshire the fact that one takes under circumstances that would lead a careful and prudent man to suspect that the note was invalid does not necessarily prevent him from being a *bona fide* holder.⁵ In Vermont one who takes under such circumstances cannot be a *bona fide* holder.⁶ A note was given in New Hampshire, payable in Vermont; and suit was brought thereon in New Hampshire. Vermont law was held to control as to whether the indorsee was a *bona fide* holder or not.⁷ The law of the place of performance controls as to the number of days of grace,⁸ whether, if the last day of grace falls on Sunday the note is payable on Saturday or Monday,⁹ and what notice should be given.¹⁰ The liability of an indorser of a

¹ Evans v. Anderson, 78 Ill. 558; Strawberry Point Bank v. Lee, 117 Mich. 122; 75 N. W. 444; Clark v. Porter, 90 Mo. App. 143. (Made in the Indian Territory, where Arkansas law is in force, payable in Arkansas.)

² Brabston v. Gibson, 9 How. (U. S.) 263; Shoe, etc., Bank v. Wood, 142 Mass. 563; 8 N. E. 753; Barger v. Farnham, 130 Mich. 487; 90 N. W. 281.

³ Stevens v. Gregg, 89 Ky. 461; 12 S. W. 775; Woods v. Ridley, 11 Humph. (Tenn.) 194.

⁴ Webster v. Machine Co., 54 Conn. 394; 8 Atl. 482; Woodruff v. Hill, 116 Mass. 310; Limerick National

Bank v. Howard, 71 N. H. 13; 93 Am. St. Rep. 489; 51 Atl. 641.

⁵ Green v. Bickford, 60 N. H. 159.

⁶ Limerick National Bank v. Adams, 70 Vt. 132; 40 Atl. 166.

⁷ Limerick National Bank v. Howard, 71 N. H. 13; 93 Am. St. Rep. 489; 51 Atl. 641.

⁸ Goddin v. Shipley, 7 B. Mon. (Ky.) 575; Blodgett v. Durgin, 32 Vt. 361; Second National Bank v. Smith, 118 Wis. 18; 94 N. W. 664.

⁹ Stebbins v. Leowolf, 3 Cush. (Mass.) 137.

¹⁰ Second National Bank v. Smith, 118 Wis. 18; 94 N. W. 664. (This note was dated in Wisconsin, but executed, delivered and payable in

promissory note is determined by the law of the place where such contract is made, as long as the parties are not shown to have intended a negotiation and delivery of such note in another state after indorsement.¹¹ Hence, even if a note is executed and payable in another state, a contract of indorsement is controlled by the law of the place where made.¹²

§1733. Construction.

Questions of construction are generally controlled by the law of the place of performance.¹ Thus an insurance policy payable in England is governed by English law as to the meaning of the term "in collision."² So a contract of guaranty dated in Illinois, signed in Michigan, mailed from Michigan to the guarantee in Illinois, and payable if at all in Illinois, was controlled as to the liability of the guarantor by Illinois law.³ If a contract of insurance is made where the insured is domiciled and is there to be performed, the law of that state controls as to the meaning of the word "heirs" used in the policy to indicate the beneficiaries, though the insured removes his domicile to another state after taking such policy and before his death.⁴ If a contract is to be performed in part in one

Indiana. Indiana law controlled in a suit in Wisconsin.)

¹¹ Case v. Heffner, 10 Ohio 180.

¹² Spies v. Bank, 174 N. Y. 222; 61 L. R. A. 193; 66 N. E. 736.

¹ London Assurance v. Companhia de Moagens, 167 U. S. 149; Cox v. United States, 6 Pet. (U. S.) 172; Abt v. Bank, 159 Ill. 467; 50 Am. St. Rep. 175; 42 N. E. 856; Banco de Sonora v. Casualty Co., — Ia. —; 95 N. W. 232; Alexandria, etc., R. R. v. Johnson, 61 Kan. 417; 59 Pac. 1063; Farmer v. Etheridge (Ky.), 69 S. W. 761; Stevens v. Gregg, 89 Ky. 461; 12 S. W. 775; Shoe, etc., Bank v. Wood, 142 Mass. 563; 8 N. E. 753; Tolman Co. v. Reed, 115 Mich. 71; 72 N. W. 1104; Stahl v. Mitchell, 41 Minn. 325; 43 N. W. 385; St. Nicholas Bank v.

National Bank, 128 N. Y. 26; 13 L. R. A. 241; 27 N. E. 849; Baum v. Birchall, 150 Pa. St. 164; 30 Am. St. Rep. 797; 24 Atl. 620; Robinson v. Queen, 87 Tenn. 445; 10 Am. St. Rep. 690; 3 L. R. A. 214; 11 S. W. 38.

² London Assurance v. Companhia de Moagens, 167 U. S. 149.

³ Tolman Co. v. Reed, 115 Mich. 71; 72 N. W. 1104. (The Michigan court had held the guarantor liable under its own law, Tolman v. Griffin, 111 Mich. 301; 69 N. W. 649, while the Illinois courts had held him not liable, Tolman Co. v. Rice, 164 Ill. 255; 45 N. E. 496.)

⁴ Mullen v. Reed, 64 Conn. 240; 42 Am. St. Rep. 174; 24 L. R. A. 664; 29 Atl. 478.

place and in part in another, the law of each place governs as to the construction of that part there to be performed.⁵ The question as to what constitutes such change of possession as to pass title to personalty under a contract of sale is controlled by the law of the place where the personalty is situated, as it is performable there.⁶ A contract for insuring valuable packages during transportation, which provides that they are to be "sealed by an adult," impliedly requires them to be sealed at the place of business of the insured, which in this case was in Mexico, though the transportation, covered by the insurance began and ended within Arizona; and hence while they must be actually sealed in Mexico, the law of Mexico determines who is an adult.⁷ In some cases the view has been expressed that the law of the place of making the contract controls its construction.⁸ Thus the interpretation of a contract of insurance is said to be controlled by the law of the state where it takes effect.⁹

§1734. Remedies in general.

Questions of the remedy to be given in an action on a contract are controlled by the law of the forum.¹ The reason which underlies this rule is that while comity may require the courts of one jurisdiction to recognize substantive rights which arise under and are affected by the laws of other jurisdictions, no such principle of comity requires such courts to give remedies other or different from those which it gives in actions controlled by its own laws. Thus the law of the forum determines whether an action as against one who in consideration

⁵ *Liverpool, etc., Co. v. Ins. Co.*, 129 U. S. 397, 454; *Banco de Sonora v. Casualty Co.*, — Ia. —; 95 N. W. 232; *Baldwin v. Thayer*, 71 N. H. 257; 93 Am. St. Rep. 510; 52 Atl. 852.

⁶ *Baldwin v. Thayer*, 71 N. H. 257; 93 Am. St. Rep. 510; 52 Atl. 852.

⁷ *Banco de Sonora v. Casualty Co.*, — Ia. —; 95 N. W. 232.

⁸ *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262; *In re Swift*, 105 Fed. 493; *Antes v. Ins. Co.*, 61 Neb. 55; 84 N. W. 412.

⁹ *Seely v. Ins. Co.*, 72 N. H. 49; 55 Atl. 425.

¹ *Lamberton v. Grant*, 94 Me. 508; 80 Am. St. Rep. 415; 48 Atl. 127; *Young v. Hart*, 101 Va. 480; 44 S. E. 703.

of a conveyance to himself has assumed a mortgage debt² is in law or in equity. So the question whether an action on an instrument under a scroll seal should be in covenant or in assumpsit was determined by the law of the jurisdiction where the suit was brought.³ Furthermore, unless the law of the forum limits certain remedies to domestic contracts, foreign contracts are to be enforced by the same remedies as domestic contracts. Thus a contract for material, entered into in one state and to be performed by delivering it in another for use in a building, entitles the vendor to the benefit of the mechanic's lien laws of the latter state if suit is there brought.⁴ If a telegram is sent from a given state and suit is brought there, the law of that state is held to apply as to the measure of damages.⁵

§1735. Evidence.

The law of the forum controls as to questions of the evidence by which the truth of the facts in issue may be proved or disproved.¹ Thus while questions of the notice necessary to hold parties secondarily liable are controlled by the law of the place of performance, the question of the evidence by which the notice thus found requisite may be proved is controlled by the law of the forum.² Where the statute of frauds is held to be a rule of evidence and not a rule as to the form of the contract itself, the law of the forum controls as to the question of its

² Willard v. Wood, 164 U. S. 502; s. c., 135 U. S. 309; Burchard v. Dunbar, 82 Ill. 450; 25 Am. Rep. 334; New York Life Ins. Co. v. Aitkin, 125 N. Y. 660; 26 N. E. 732.

³ Le Roy v. Beard, 8 How. (U. S.) 451.

⁴ Mack v. Roberts' Quarries, 57 O. S. 463; 63 Am. St. Rep. 729; 49 N. E. 467.

⁵ Western Union Telegraph Co. v. Waller, 96 Tex. 589; 97 Am. St. Rep. 936; 74 S. W. 751. (The question involved being whether dam-

ages were recoverable for mental anguish.)

¹ Pritchard v. Norton, 106 U. S. 124; Wilcox v. Hunt, 13 Pet. (U. S.) 378; Downer v. Chesebrough, 36 Conn. 39; 4 Am. Rep. 29; Union Central Life Ins. Co. v. Pollard, 94 Va. 146; 64 Am. St. Rep. 715; 36 L. R. A. 271; 26 S. E. 421; Second National Bank v. Smith, 118 Wis. 18; 94 N. W. 664.

² Second National Bank v. Smith, 118 Wis. 18; 94 N. W. 664.

application.³ So if an unsigned written report as to a matter affecting the credit of another person⁴ is actionable where made, but suit is brought thereon in another jurisdiction, the law of the forum controls.⁵

§1736. Parol evidence rule.

The parol evidence rule is not, properly speaking, a rule of evidence but a rule of substantive law. It deals with what the terms of a contract in law are, and not merely with the evidence by which it is to be proved.¹ Accordingly, the law of the forum does not apply to this rule.² So if a suit is brought on a contract of indorsement, the question whether an oral agreement limiting liability to the amount collected on certain collateral assigned over for convenience in collection, is admissible as a defense is determined by the law controlling the contract and not by the law of the forum.³

§1737. Statutes of limitation.

The statute of limitations is generally held to affect the remedy.¹ The law of the place where the suit is brought controls, therefore,² as to the question of the application of such statute.³ Thus the question whether the assumption of a mortgage debt by accepting a deed conveying the mortgaged realty with a clause providing for such assumption is a simple

³ See § 1722. As to contracts relating to realty, see § 1723.

⁴ See § 94.

⁵ *Third National Bank v. Steel*, 129 Mich. 434; 64 L. R. A. 119; 88 N. W. 1050.

¹ See § 1190.

² *Baxter National Bank v. Talbot*, 154 Mass. 213; 13 L. R. A. 52; 28 N. E. 163.

³ *Baxter National Bank v. Talbot*, 154 Mass. 213; 13 L. R. A. 52; 28 N. E. 163.

¹ See §§ 1647, 1648.

² See § 1733.

³ *Willard v. Wood*, 164 U. S. 502;

United States Bank v. Donnally, 8 Pet. (U. S.) 361; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 122 Fed. 232; 58 C. C. A. 596; *Burgett v. Williford*, 56 Ark. 187; 35 Am. St. Rep. 96; 19 S. W. 750; *Labatt v. Smith*, 83 Ky. 599; *Bulger v. Roche*, 11 Pick. (Mass.) 36; 22 Am. Dec. 359; *Home Life Ins. Co. v. Elwell*, 111 Mich. 689; 70 N. W. 334; *Wright v. Mordaunt*, 77 Miss. 537; 78 Am. St. Rep. 536; 27 So. 640; *New York Life Ins. Co. v. Aitkin*, 125 N. Y. 660; 26 N. E. 732; *Barbour v. Erwin*, 14 Lea (Tenn.) 716.

contract or not, for the purpose of determining the period of limitations is controlled by the law of the forum.⁴ If the statute is held not merely to affect the remedy, but also to extinguish the right, the law of the place controlling the transaction applies, and not the law of the forum.⁵ If the statute has run where the cause of action is made and to be performed, and its effect is not merely to bar the remedy but to extinguish the right, it is held that the subsequent removal of the debtor to another state where a longer time is given by limitations cannot give to the creditor the right to enforce such contract.⁶ The theory underlying this last doctrine is that by the running of the statute of limitations a property right has been acquired by the debtor, of which he is not divested by his removal to another state. The difficulty in applying it lies in the fact that as similar statutes are treated sometimes as extinguishing the right and sometimes as barring the remedy, the practical result is often a conflict of judicial opinion and not the recognition of two consistent and distinguishable principles. The fact that the claim has been reduced to judgment in a foreign jurisdiction starts the statutes of limitations to running anew in any state where suit may be brought on such judgment, and makes the time fixed by such statute, expressly or by construction, for suing on foreign judgments, control. It does not, however, prevent the action on such judgment in another state from being barred by such lapse of time as is fixed by the jurisdiction of the forum, even if such judgment would not be barred in the state in which it was rendered.⁷ Accordingly, the revivor of a judgment in the state in which it was rendered by proceedings in which no personal service was had on the judgment debtor does not prevent limitations from

⁴ Willard v. Wood, 164 U. S. 502. (Held to be a simple contract.)

⁵ Davis v. Mills, 194 U. S. 451.

⁶ Rathbone v. Coe, 6 Dak. 91; 50 N. W. 620; Lamberton v. Grant, 94 Me. 508; 80 Am. St. Rep. 415; 48 Atl. 127; Berkley v. Tootle, 163 Mo. 584; 85 Am. St. Rep. 587; 63 S. W.

681; Eingartner v. Steel Co., 103 Wis. 373; 74 Am. St. Rep. 871; 79 N. W. 433.

⁷ Ambler v. Whipple, 139 Ill. 311; 32 Am. St. Rep. 202; 28 N. E. 841; Rice v. Moore, 48 Kan. 590; 30 Am. St. Rep. 318; 16 L. R. A. 198; 30 Pac. 10.

running against such judgment in another state.⁸ Statutes of many states provide that if a cause of action is barred where it arose it shall be barred in an action in the courts of the state in which such statute is in force. While such statutes expressly adopt the law of the state where the cause of action arose, they do not adopt the law of another state where suit might have been brought upon such cause of action.⁹ Thus a note was given in Maine where both maker and payee were domiciled and was there payable. Before suit was there barred, the maker removed to New York, and remained there for so long a period that limitations ran in his favor at New York law. By the law of Maine, such note was not barred, since the time of the defendant's absence from the state did not by statute count in the running of the statute. Accordingly, it was held that an action could be brought on such note in Massachusetts.¹⁰ So such statute does not apply where the defendant is a non-resident of the state where the cause of action arose, as the right of action is not barred there.¹¹ Under such statute, a cause of action not barred in the state where suit is brought is not barred if the creditor can enforce it by any form of action or procedure there given to him. Thus if a judgment is so barred by lapse of time that it can in no way be enforced where rendered, it cannot be enforced in another state where a statute of this type is in force; but if, though dormant, it could be revived, an action can be brought thereon in another state if not barred by the laws of such state.¹²

§1738. Federal and state law.—Written law.

Analogous to the subject of conflict of laws is the question of the law which controls when a cause of action on a contract

⁸ Rice v. Moore, 48 Kan. 590; 30 Am. St. Rep. 318; 16 L. R. A. 198; 30 Pac. 10; Hepler v. Davis, 32 Neb. 556; 29 Am. St. Rep. 457; 13 L. R. A. 565; 49 N. W. 458.

⁹ Janeway v. Burton, 201 Ill. 78; 66 N. E. 337; affirming 102 Ill. App. 403; McCann v. Randall, 147 Mass.

81; 9 Am. St. Rep. 666; 17 N. E. 75.

¹⁰ McCann v. Randall, 147 Mass. 81; 9 Am. St. Rep. 666; 17 N. E. 75.

¹¹ Martin v. Wilson, 120 Fed. 202; 58 C. C. A. 181.

¹² Berkley v. Tootle, 163 Mo. 584; 85 Am. St. Rep. 587; 63 S. W. 681.

arises within a state of the union, and the action is brought before a Federal court, and not before a state court. It is generally said that the law of the state in which the cause of action arose controls.¹ This rule, however, both in its wording and in its application by the courts leaves open for discussion the vital question whether this means the law of the state as its own courts pronounce it, or the law of the state as the Federal courts may pronounce it, ignoring the decisions of the state courts. In passing upon this question, the courts distinguish between written and unwritten law. If the rights of the parties are determined by state statute or constitution, the Federal courts follow the construction placed upon such written law by the state courts.² Thus a railroad company leased land in Iowa by its track by a lease which contained a stipulation releasing the lessor from all liability by reason of fire caused by lessor. The Iowa statute forbade such provision in contracts between carrier and shipper. It was first held that such provision in a lease was invalid,³ but on rehearing, the provision was held to be valid.⁴ A second rehearing resulted in the same decision as the first rehearing. It was held proper for the Federal court to follow the final decision of the state court.⁵ It must be noted, however, that the opinion of the court in this last case indicates a very limited range for the operation of state law.⁶ The decision of a state court of last

¹ *Western Union Telegraph Co. v. Publishing Co.*, 181 U. S. 92; *Hartford Fire Ins. Co. v. Ry.*, 175 U. S. 91; affirming 70 Fed. 201; 17 C. C. A. 62; 30 L. R. A. 193; *Wheaton v. Peters*, 8 Pet. (U. S.) 591.

² *Hartford Fire Ins. Co. v. Ry.*, 175 U. S. 91; affirming 70 Fed. 201; 17 C. C. A. 62; 30 L. R. A. 193; *Wade v. Travis County*, 174 U. S. 499; *Sioux City R. R. v. Trust Co.*, 173 U. S. 99; *Williams v. Eggleston*, 170 U. S. 304; *Bauserman v. Blunt*, 147 U. S. 647; *Burgess v. Seligman*, 107 U. S. 20; *Fairfield v. Gallatin County*, 100 U. S. 47; *Morgan v. Curtenius*, 20 How. (U. S.) 1.

³ *Griswold v. Ry.* (Ia.), 53 N. W. 295.

⁴ *Griswold v. Ry.*, 90 Ia. 265; 24 L. R. A. 647; 57 N. W. 843.

⁵ *Hartford Fire Ins. Co. v. Ry.*, 175 U. S. 91; affirming 70 Fed. 201; 17 C. C. A. 62; 30 L. R. A. 193.

⁶ "Questions of public policy as affecting the liability for acts done or upon contracts made and to be performed within one of the states of the Union,—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, or national or universal ap-

resort has been held to control as to the meaning of a state statute, prescribing the terms on which foreign insurance companies may do business in the state, and giving the right under certain circumstances, to paid-up policies, extended insurance and the like,⁷ as to the necessity of demand before commencing suit,⁸ and as to the effect of the state statute concerning usury.⁹ The decision of a state court is "at least most persuasive"¹⁰ on the question whether under a state statute a trustee of a corporation became liable by reason of a failure to file a report as required by law, upon notes indorsed by the corporation, acting through another officer without the notice of the trustee sought to be held, and for the accommodation of such other officer.¹¹ If, however, the rights of the parties are fixed before the decision of the state court is rendered, "the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt;"¹² but if the question seems a clear one they "claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."¹³

plication,—are governed by the law of the state as expressed in its own constitution and statutes, or declared by its highest court." *Hartford Fire Ins. Co. v. Ry. Co.*, 175 U. S. 91, 100; affirming 70 Fed. 201; 17 C. C. A. 62; 30 L. R. A. 193.

⁷ *New York Life Ins. Co. v. Cravens*, 178 U. S. 389; affirming *Cravens v. Ins. Co.*, 148 Mo. 583; 71 Am. St. Rep. 628; 53 L. R. A. 305; 50 S. W. 519.

⁸ *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335.

⁹ *Missouri, etc., Co. v. Krumseig*, 172 U. S. 351; *Scudder v. Bank*, 91 U. S. 406. "Usury is, of course, merely a statutory offense, and Federal courts in dealing with such a question must look to the laws of the state where the transaction took

place, and follow the construction put upon such laws by the state courts." *Missouri, etc., Co. v. Krumseig*, 172 U. S. 351, 355.

¹⁰ *Park Bank v. Remsen*, 158 U. S. 337, 342.

¹¹ *Park Bank v. Remsen*, 158 U. S. 337 (following *Park Bank v. Security Co.*, 116 N. Y. 281; 5 L. R. A. 673; 22 N. E. 567, in holding that the trustee was not liable).

¹² *Burgess v. Seligman*, 107 U. S. 20, 34.

¹³ *Burgess v. Seligman*, 107 U. S. 20, 34. To the same effect, see *Stanley County v. Coler*, 190 U. S. 437; *Barnum v. Okolona*, 148 U. S. 393; *Pleasant Township v. Ins. Co.*, 138 U. S. 67; *Anderson v. Santa Anna*, 116 U. S. 356; *Carroll County v. Smith*, 111 U. S. 556.

§1739. Constitutionality of state statutes.

Decisions of a state court as to whether a state statute is in conformity to the state constitution are very generally followed by the federal courts.¹ One well-recognized exception to the general rule that federal courts follow state decisions as to the construction of the state constitution and the consequent validity of state statutes, is found where the statute in question constitutes a contract.² Thus the validity of a statute under which bonds were issued refunding a prior debt, which provided that coupons should be received for taxes, is a question upon which the United States courts will decide for themselves, and having held such a statute valid,³ before the rendition of a decision of a state court holding such statute void,⁴ the Supreme Court of the United States will follow its prior decisions on this point and not those of the state court.⁵ In deciding the constitutionality of statutes authorizing the issuing of bonds for public improvements the federal courts will in cases coming before them for trial follow the decisions of the state courts rendered prior to the issuing of the bonds,

¹ *Backus v. Depot Co.*, 169 U. S. 557; *Nobles v. Georgia*, 168 U. S. 398; *St. Anthony, etc., Co. v. Water Commissioners*, 168 U. S. 349; *Merchants, etc., Bank v. Pennsylvania*, 167 U. S. 461; *Forsyth v. Hammond*, 166 U. S. 506; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Oakes v. Mase*, 165 U. S. 363; *Dibble v. Land Co.*, 163 U. S. 63; *Illinois Central Ry. Co. v. Illinois*, 163 U. S. 142; *Balkam v. W. Iron Co.*, 154 U. S. 177; *Goodnow v. Wells*, 67 Ia. 654; 25 N. W. 864.

² *Stearns v. Minnesota*, 179 U. S. 223; *Douglas v. Kentucky*, 168 U. S. 488; *Bacon v. Texas*, 163 U. S. 207; *Mobile, etc., R. R. v. Tennessee*, 153 U. S. 486; *Ohio Life Ins. Co. v. Debolt*, 16 How. (U. S.) 416. "This court has always held that the com-

petency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract were matters which in discharging its duty under the Federal constitution it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract." *Stearns v. Minnesota*, 179 U. S. 223, 232, 233.

³ *McGahey v. Virginia*, 135 U. S. 662; *Hartman v. Greenhow*, 102 U. S. 672.

⁴ *Commonwealth v. McCullough*, 90 Va. 597; 19 S. E. 114.

⁵ *McCullough v. Virginia*, 172 U. S. 102.

ignoring later contrary decisions.⁶ If no specific adjudication as to the constitutionality of a statute has been made at the time that the contract in question is entered into and the rights of the parties are fixed, the federal courts are not bound to follow a subsequent decision of the state supreme court, rendered after the contract is entered into but before suit is brought thereon, but may exercise their independent judgment.⁷ An exception to this last rule has been said to arise "when the question is whether a particular statute was passed by the legislature in the manner prescribed by the state constitution so as to become a law of the state,"⁸ in which case the federal courts are bound to follow the ultimate decision of the state court.⁹

§1746. Unwritten law.

If the rights of the parties are controlled by the unwritten or Common Law, we find that the courts often repeat that "there is no Common Law of the United States in the sense of a national customary law distinct from the Common Law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes."¹ While this rule might seem to indicate that the federal courts follow the state decisions, it is to be qualified by the proposition that "a determination in a particular case of what that law (i. e., that of a given state) is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state."² The courts of the United States thus recognize

⁶ *Loel v. Columbia Township*, 179 U. S. 472.

⁷ *Great Southern, etc., Co. v. Jones*, 193 U. S. 532. To the same effect, see *Folsom v. Ninety-Six*, 159 U. S. 611.

⁸ *Great Southern, etc., Co. v. Jones*, 193 U. S. 532, 546.

⁹ *Wilkes County v. Coler*, 180 U. S. 506; *Post v. Supervisors*, 105 U. S. 667; (*Town of*) *South Ottawa v. Perkins*, 94 U. S. 260.

¹ Summary of holding in *Wheaton v. Peters*, 8 Pet. (U. S.) 591, made in *Smith v. Alabama*, 124 U. S. 465, 478; and quoted in *Western Union Telegraph Co. v. Publishing Co.*, 181 U. S. 92, 101.

² *Smith v. Alabama*, 124 U. S. 465 (478); quoted in *Western Union Telegraph Co. v. Publishing Co.*, 181 U. S. 92, 101.

the existence of a general law, uniform throughout the United States, based on state law as expressed in the decisions of state courts, but a law which the United States courts are building up for themselves. If a case involving a question of this general law comes before the federal courts for adjudication they will give great weight to the decisions of courts of the state whose law controls,³ but will not follow these decisions if contrary to the view of the federal courts as to what that general law is.⁴ As applied to contracts, Commercial Law is the chief example of that law general in its nature, upon which the decisions of the state courts are not controlling.⁵ In the leading case on this point,⁶ the Supreme Court of the United States said that the rule that federal courts should follow decisions of state courts "does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon this subject are entitled to, and will receive, the most deliberate attention and respect of this court, but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." Examples of this principle are found in cases involving negotiable instruments.⁷ The New York courts held that one who took a negotiable instrument in payment of a pre-existing debt could not be a *bona fide* holder.⁸ In a case

³ Farmers' National Bank v. Mfg. Co., 52 Fed. 191; 17 L. R. A. 595.

⁴ R. R. v. Lockwood, 17 Wall. (U. S.) 357; Swift v. Tyson, 16 Pet. 1; Hudson Furniture Co. v. Harding, 70 Fed. 468; 30 L. R. A. 513; Farmers' National Bank v. Mfg. Co., 52 Fed. 191; 17 L. R. A. 595.

⁵ Hudson Furniture Co. v. Harding, 70 Fed. 468; 30 L. R. A. 513. "On a question of general commercial law, the Federal courts administering justice in New York have equal and co-ordinate jurisdiction

with the courts of that state." R. R. v. Lockwood, 17 Wall. (U. S.) 357, 367, 368.

⁶ Swift v. Tyson, 16 Pet. (U. S.) 1, 19.

⁷ Hudson Furniture Co. v. Harding, 70 Fed. 468; 30 L. R. A. 513; Farmers' National Bank v. Mfg. Co., 52 Fed. 191; 17 L. R. A. 595.

⁸ Payne v. Cutler, 13 Wend. (N. Y.) 605; Ontario Bank v. Worthington, 12 Wend. (N. Y.) 593; Roosa v. Brotherson, 10 Wend. (N. Y.) 86.

arising in New York, the United States courts refused to follow the New York decisions and held that such a holder might be *bona fide*.⁹ The same principle applies to contracts of common carriers. The New York courts held that a carrier may by contract relieve himself from liability even for his own negligence.¹⁰ In a case arising in New York the federal courts held that such a provision in a drover's pass was invalid.¹¹ Policies of insurance, if not controlled by state statutes, belong in this class.¹² The Massachusetts courts held that insurers were liable on memorandum articles, even if there was not a total loss.¹³ The federal courts refused to follow this rule in a Massachusetts contract, holding that there could be no recovery except for a total loss.¹⁴ In view of this mass of federal authority, and of the fact that the federal courts are beyond the control of the state courts in their own peculiar jurisdiction, it is vain for an indignant state court to declare that "general Commercial Law" is "mythical,"¹⁵ though it may of course refuse, in deciding cases within its own exclusive jurisdiction, to recognize or enforce such general Commercial Law. It is to be regretted that on so many important and oft-recurring subjects the rights of the parties depend upon the accident, remote from the merits of the case, of whether they can bring their case before the federal courts, or whether they must abide by the decisions of the state courts.

⁹ *Swift v. Tyson*, 16 Pet. (U. S.) 1.

¹⁰ Persons traveling on drovers' passes. *Poucher v. R. R.*, 49 N. Y. 263; 10 Am. Rep. 364; *Bissell v. R. R.*, 25 N. Y. 442; 82 Am. Dec. 369; (reversing 29 Barb. (N. Y.) 602); *Smith v. R. R.*, 24 N. Y. 222; affirming 29 Barb. (N. Y.) 132.

¹¹ *R. R. v. Lockwood*, 17 Wall. (U. S.) 357.

¹² "The policy was a Massachusetts contract, it is true, but its construction depended upon questions of general commercial law, in

respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the state decisions as in matters of purely local law." *Washburn, etc., Co. v. Ins. Co.*, 179 U. S. 1, 15.

¹³ *Mayo v. Ins. Co.*, 152 Mass. 172; 23 Am. St. Rep. 814; 9 L. R. A. 831; 25 N. E. 80; *Kettell v. Ins. Co.*, 10 Gray (Mass.) 144.

¹⁴ *Washburn, etc., Co. v. Ins. Co.*, 179 U. S. 1.

¹⁵ *Forepaugh v. Ry.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; 5 L. R. A. 508; 18 Atl. 503.

CHAPTER LXXXI.

IMPAIRMENT OF OBLIGATION OF CONTRACT.

§1741. Impairment of obligation of contract.

“No state shall pass any law impairing the obligation of contracts.”¹ This provision was inserted in the Constitution with but little debate, and undoubtedly for the purpose of preventing the states from passing laws repudiating private debts — a form of legislation which had proved popular in some of the states in the period of quasi-anarchy that followed the Revolution. Its effects have been very wide reaching and many questions of contract law have thus been brought within the jurisdiction of the federal courts. In such cases it is the duty of the Supreme Court of the United States “to determine for itself the existence, construction and validity of the alleged contract and also to determine whether as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below.”² Even the construction of the state constitution by the state courts is not binding on the federal courts in such questions.³ This provision, it may be added, does not forbid retroactive laws in general, but only such as impair the obligation of contracts.⁴ Similar clauses have been inserted in state constitutions. They, of course, can bind only the state legislature and public corporations created by the state. From their identity with the clause in the Constitution of the United States, cases de-

¹ Constitution of the United States, Article I., § 10.

² Houston, etc., Ry. v. Texas, 177 U. S. 66, 77; McCullough v. Virginia, 172 U. S. 102; Bacon v. Texas, 163 U. S. 207; New Orleans Water

Works Co. v. Refining Co., 125 U. S. 18.

³ Stearns v. Minnesota, 179 U. S. 223.

⁴ Callahan v. Callahan, 36 S. C. 454; 15 S. E. 727.

cided under one of these clauses are precedents for determining the scope and meaning of the other clauses, and will be cited accordingly.

§1742. To what governments this clause applies.

By its terms this clause of the Constitution provides that "no state" shall pass the laws in question. It does not, therefore, restrict the power of the United States government.¹ If in the exercise of its authority, the United States passes an act otherwise constitutional which impairs the obligation of contracts, such act is not on that account objectionable. Thus a federal bankrupt act which discharges debts existing before its passage,² an act affecting the medium of payment of past debts,³ or an act regulating interstate commerce, which avoids pre-existing contracts,⁴ are each valid. Whether this clause applies to territories or the District of Columbia is a question still in doubt.⁵ On the one hand, it seems that Congress, having itself power to pass laws impairing the obligation of contracts and having power to create territorial governments instead of legislating for the territories directly, could bestow such power upon the territory if it pleased. On the other hand, it seems absurd to hold that a territory has in this regard greater power than a state. This clause undoubtedly applies to the states of the union while members of the union,⁶ even if they are actually

¹ *Juilliard v. Greenman*, 110 U. S. 421; *Legal Tender Cases*, 12 Wall. (U. S.) 457; *Evans-Snider-Buel Co. v. McFadden*, 105 Fed. 293; 44 C. C. A. 494; 58 L. R. A. 900; *Ansley v. Ainsworth*. — *Ind. Ter.* —; 69 S. W. 884; *Hopkins v. Jones*, 22 Ind. 310; *Fitzgerald v. Ry.*, 63 Vt. 169; 13 L. R. A. 70; 22 Atl. 76.

² *In re Herrman*, 106 Fed. 987; 46 C. C. A. 77; affirming 102 Fed. 753; *Loud v. Pierce*, 25 Me. 233; *Cutter v. Folsom*, 17 N. H. 139.

³ *Legal Tender Cases*, 12 Wall. (U. S.) 457.

⁴ *Fitzgerald v. Ry.*, 63 Vt. 169; 13 L. R. A. 70; 22 Atl. 76.

⁵ Thus in *Hanford v. Davies*, 163 U. S. 273, the court held that "even if it were assumed that the constitutional provision in question applied to the legislative enactments of a territory," the judgment of a territorial court was not a "law" in this sense.

⁶ *Los Angeles v. Water Co.*, 177 U. S. 558; *Houston, etc., Ry. v. Texas*, 170 U. S. 243; *Mobile, etc., R. R. v. Tennessee*, 153 U. S. 486; *Bier v. McGehee*, 148 U. S. 137.

in a state of rebellion,⁷ but it does not apply to the states of the union before the formation of the union,⁸ nor to independent states before their admission to the union.⁹ It also applies to public corporations such as municipalities created by the states for governmental purposes.¹⁰ This clause has no application to foreign governments. If their laws determine the validity of a contract upon which an action is brought in our courts,¹¹ effect must be given even to statutes which impair the obligation of contracts. Thus an act of the Parliament of Canada¹² is not made invalid by this clause of the Federal Constitution.

§1743. To what laws this clause applies.

By its terms, this clause of the Constitution forbids "any law" of the kind specified. "Law" as used in this sense undoubtedly includes written laws of every class, such as state constitutions,¹ state statutes,² and city ordinances.³

§1744. Change of judicial decision.

Whether a change of judicial decision, making invalid a contract which under prior decisions was valid, amounts to a law within the meaning of this clause of the statute, is a ques-

⁷ *Williams v. Bruffy*, 96 U. S. 176; *White v. Hart*, 13 Wall. (U. S.) 646.

⁸ *Owings v. Speed*, 5 Wheat. (U. S.) 420.

⁹ *Herman v. Phalen*, 14 How. (U. S.) 79; following *League v. De Young*, 11 How. (U. S.) 185.

¹⁰ *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23; *Mercantile, etc., Co. v. Ry.*, 99 Fed. 812; *Iron Mountain Ry. Co. v. Memphis*, 96 Fed. 113; 37 C. C. A. 410; *Neill v. Gates*, 152 Mo. 585; 54 S. W. 460.

¹¹ See Ch. LXXX.

¹² *Canada Southern Ry. v. Gebhard*, 109 U. S. 527.

¹ *City of Los Angeles v. Water Co.*, 177 U. S. 558; *Houston, etc.,*

Ry. v. Texas, 170 U. S. 243; *Bier v. McGehee*, 148 U. S. 137; *St. Tammany Water Works v. Water Works*, 120 U. S. 64; *Fiske v. Police Jury*, 116 U. S. 131; *New Orleans Gas Co. v. Light Co.*, 115 U. S. 650; *Ede v. Knight*, 93 Cal. 159; 28 Pac. 860.

² *Mobile, etc., R. R. v. Tennessee*, 153 U. S. 486; *Chicago Ins. Co. v. Needles*, 113 U. S. 574; *Louisiana v. Pilsbury*, 105 U. S. 278.

³ *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23; *Mercantile, etc., Co. v. Ry.*, 99 Fed. 812; *Iron Mountain Ry. v. Memphis*, 96 Fed. 113; 37 C. C. A. 410; *Neill v. Gates*, 152 Mo. 585; 54 S. W. 460.

tion which cannot be answered either by a simple affirmative or negative. Since the validity of a law impairing the obligation of a contract is affected by a clause in the Constitution of the United States, the Supreme Court of the United States is the final arbiter as to the validity of such law. Accordingly, the question of the validity of a change of judicial decision, affecting prior contracts, necessarily involves the extent to which federal courts follow the decisions of state courts. It is at this point that a distinction, too often ignored, must be insisted upon. Cases of this sort are divided into two classes. (1) If the case originates in or is removed to an inferior Federal court and is taken from such court to the Supreme Court of the United States on error or appeal, the Supreme Court of the United States will, indeed, in some cases, apply the law of the state in which the cause of action arose,¹ but will not necessarily follow the latest decision of such state. Leaving for discussion elsewhere² the question of what state decision in case of conflict will be followed when the cause of action arises after the later decision, we find that if the action is brought to enforce contract rights which were acquired before the later decision was promulgated, the Supreme Court will follow the rule as laid down by the courts and existing when the contract was entered into.³ The inferior federal courts, before which such cases are heard, follow the decisions of the Supreme Court of the United States as a matter of course, and apply the rule of law as recognized by the state courts when the contract was made.⁴ So if contract rights are

¹ See § 1738 *et seq.*

² See § 1740.

³ *Los Angeles v. Water Co.*, 177 U. S. 558; *McCullough v. Virginia*, 172 U. S. 102; *Anderson v. Santa Anna Township*, 116 U. S. 356; *Louisiana v. Pilsbury*, 105 U. S. 278; *Douglass v. Pike County*, 101 U. S. 677; *Olcott v. Supervisors*, 16 Wall. (U. S.) 678; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50; *Havemeyer v. Iowa County*, 3 Wall. (U. S.) 294; *Ohio, etc., Co. v. Debolt*, 16

How. (U. S.) 416; *Rowan v. Runnels*, 5 How. (U. S.) 134.

⁴ *Union Bank v. Oxford*, 90 Fed. 7. (The validity of the bonds in question in this case depended upon the validity of the construction of the state statute under which they were issued. The decision of the Supreme Court of North Carolina as to the validity of the statute, in *Carr v. Coke*, 116 N. C. 223; 47 Am. St. Rep. 801; 28 L. R. A. 737; 22 S. E. 16, and as to the validity of

acquired before the question of law has been decided by the state supreme court, the Federal courts will not necessarily follow a decision of the state court rendered thereafter. Thus a building contract was entered into and a sub-contractor's lien for material was taken before the state supreme court had passed upon the question of the validity of the sub-contractor's mechanic's lien law under which such lien was taken. Subsequently the State Supreme Court held such law to be unconstitutional.⁵ Suit was brought to enforce such lien after such decision was rendered. The United States courts refused to follow the decision of the state court; but in accordance with the weight of authority preferred the view that such statute was constitutional.⁶

(2) If the case comes to the Supreme Court of the United States on error to the court of a state, a change of judicial opinion alone, there being no change in the written law, is not a law impairing the obligation of contracts within the meaning of this clause.⁷ Thus a contract and conveyance of realty by a married woman which is valid as the statute concerning conveyances by married women is then construed, but which is invalid under the construction subsequently given to the same

the bonds thereunder in *Bank v. Commissioners*, 116 N. C. 339; 21 S. E. 410, was followed, ignoring subsequent decisions.) *Southern Ry. Co. v. Ry.*, 81 Fed. 595.

⁵ *Palmer v. Tingle*, 55 O. S. 423; 45 N. E. 313. See § 1782.

⁶ *Great Southern, etc., Co. v. Jones*, 193 U. S. 532; affirming 116 Fed. 793; 54 C. C. A. 165.

⁷ *National, etc., Association v. Brahan*, 193 U. S. 635; affirming 80 Miss. 407; 57 L. R. A. 793; 31 So. 840; *Bacon v. Texas*, 163 U. S. 207; *Central Land Co. v. Laidley*, 159 U. S. 103; *New Orleans, etc., Co. v. Refining Co.*, 125 U. S. 18; *Lehigh Water Co. v. Easton*, 121 U. S. 388; *Brown v. Smart*, 145 U. S. 454; *R. v. McClure*, 10 Wall. (U. S.)

511. This rule applies to error to the Supreme Court of a territory. *Hanford v. Davies*, 163 U. S. 273. "Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the constitution, so as to give this court jurisdiction on a writ of error to a state court by some subsequent statute of the state which has been upheld or effect given to it by the state court." *Bacon v. Texas*, 163 U. S. 207, 216; quoted in *National, etc., Association v. Brahan*, 193 U. S. 635, 647.

statute, there being no intervening change in the statute, does not present an example of a law impairing the obligation of contracts.⁸ The distinction indicated in the text is clearly made in *Central Land Co. v. Laidley*;⁹ in which case the court points out that the distinction is an old one. Thus the Supreme Court of Iowa had once held bonds issued by a municipality in aid of a railroad to be valid, but had subsequently overruled its earlier decision and held them invalid. Bonds were issued before the second line of decisions was promulgated. In a case coming before an inferior Federal court and thence taken to the United States Supreme Court, it was held that the earlier line of decisions must be followed, ignoring the later ones,¹⁰ while a writ of error to the state supreme court was refused in a case which presented the same question and in which the state supreme court had followed the later line of decisions.¹¹ The supreme court of Texas¹² has endeavored to tabulate the decisions of the United States Supreme Court, a summary of which is here given, though the applicability of the cases to the propositions under which they are cited may be questioned in some instances.¹³ The explanation of this doctrine is found in the relation of judicial decisions to the law. They are not law.

⁸ *Central Land Co. v. Laidley*, 159 U. S. 103.

⁹ 159 U. S. 103.

¹⁰ *Gelpeke v. Dubuque*, 1 Wall. (U. S.) 175.

¹¹ *R. R. v. McClure*, 10 Wall. (U. S.) 511.

¹² *Storrie v. Cortes*, 90 Tex. 283; 35 L. R. A. 666; 38 S. W. 154.

¹³ I. Error to a court of the United States. (1) Where the validity of the statute on which the contract depends was recognized by the State Supreme Court when the contract was made. *Pine Grove Township v. Talcott*, 19 Wall. (U. S.) 666; *Ohio Life Ins. Co. v. Debolt*, 16 Wall. (U. S.) 432; *Olcott v. Supervisors*, 16 Wall. (U. S.) 678. (2) Where prior decisions of a state court have been relied on in making

a contract, and subsequently a statute impairs the obligation of such contract. *Ralls County v. Douglass*, 105 U. S. 720; *The City (of Kenosha) v. Lamson*, 9 Wall. (U. S.) 477; *Gelpeke v. Dubuque*, 1 Wall. (U. S.) 175. (3) Where there has been a conflict in State decisions and the United States Supreme Court is free to follow which it pleases.

II. Error to a state court, when a change in judicial decision is not a law impairing the obligation of contracts. *Central Land Co. v. Laidley*, 159 U. S. 103; *Lehigh Water Co. v. Easton*, 121 U. S. 388; *Knox v. Exchange Bank*, 12 Wall. (U. S.) 379; *R. R. v. McClure*, 10 Wall. (U. S.) 511.

They are merely the evidence of what the law is.¹⁴ A change in judicial decision is not in theory the promulgation of a new rule, but is the abandonment of a rule erroneously thought to be law in favor of a rule which is law. Accordingly this clause of the constitution is held not to apply to decisions of the courts nor to the acts of boards or officers construing the law.¹⁵ Thus an adjudication of insolvency¹⁶ or a decree ordering an executor to sell realty to pay taxes¹⁷ does not impair the obligation of contracts if decided under statutes in force when the contractual right arose, even if the Supreme Court of the United States may think such decree erroneous.

If any other theory were adopted the Supreme Court of the United States could review every judgment of a state court holding a contract invalid; and if the state court had reached its conclusion from principles of Common Law which had not been recognized before in that state by judicial decision, could reverse the judgment of the state court. This, of course, is not the law. The Supreme Court of the United States has no power to reverse the judgment of a state court merely because

¹⁴ "A decision of a court is not in fact a law and if erroneously made cannot make a law; it is simply the declaration of a court as to what the law is in the opinion of the judges." *Storrie v. Cortes*, 90 Tex. 283, 291; 35 L. R. A. 666; 38 S. W. 154. "Laws are not made by judicial decisions. The court simply determines the rights of the parties to the action in that particular controversy. It is no part of its purpose even to declare the law. It simply applies to the controversy the law as it exists when the alleged rights or liabilities accrued. The decision has never been thought to have the force and effect of law except in that special controversy. In other suits it is authority more or less persuasive, according to its reasonableness. Courts have never thought themselves bound by it, as

they are by a valid statute. And if it is manifestly wrong, the community does not act upon it. A lawyer who would have advised a client to rely upon the *Berson case* in making a loan would show his incapacity." *Alferitz v. Borgwardt*, 126 Cal. 201, 208; 58 Pac. 460.

¹⁵ "The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts or the acts of administrative or executive boards, or officers, or the doings of corporations or individuals." *New Orleans Water Works Co. v. La. Sugar Co.*, 125 U. S. 18, 30; quoted in *Ray v. Gas. Co.*, 138 Pa. St. 576, 591; 21 Am. St. Rep. 922, 12 L. R. A. 290; 20 Atl. 1065.

¹⁶ *Brown v. Smart*, 145 U. S. 454.

¹⁷ *Hanford v. Davies*, 163 U. S. 273; affirming 51 Fed. 258.

such judgment holds a contract to be invalid and the Supreme Court of the United States thinks that such judgment is erroneous and inconsistent with the pre-existing law of such state.¹⁸ The result of the doctrine last enunciated is that if state courts change their minds on questions either of constitutional construction,¹⁹ as of the conclusive effect of the signature of a bill by the presiding officers of the legislature²⁰ or of the constitutionality of statutes,²¹ or of statutory construction,²² or of Common Law,²³ they may apply the new rule to contracts made in reliance upon earlier decisions, before the new rule was enunciated²⁴ without danger of reversal by the Supreme Court of the United States.²⁵

As is indicated by the cases cited in the preceding notes, some of the state courts have taken the same view of this question as the Supreme Court of the United States. Thus the supreme court of Texas held that a homestead could be sold for assessments.²⁶ Subsequently this decision was overruled.²⁷ It was held that assessment made and taken by a contractor in the interval between these two decisions must be governed by the rule ultimately held to be correct.²⁸ While the same result has been reached in Indiana, special stress has been placed there on the fact that the change in judicial decision affected the relative rights of a school corporation and a school township

¹⁸ *Central Land Co. v. Laidley*, 159 U. S. 103; *Wood v. Brady*, 150 U. S. 18; *Lehigh Water Co. v. Easton*, 121 U. S. 388; *Knox v. Exchange Bank*, 12 Wall. (U. S.) 379; *Lawler v. Walker*, 14 How. (U. S.) 149; *Commercial Bank v. Buckingham*, 5 How. (U. S.) 317.

¹⁹ *Graves v. Moore County*, — N. C. —; 47 S. E. 134; *Storrie v. Cortes*, 90 Tex. 283; 35 L. R. A. 666; 38 S. W. 154.

²⁰ *Graves v. Moore County*, — N. C. —; 47 S. E. 134.

²¹ *Storrie v. Cortes*, 90 Tex. 283; 35 L. R. A. 666; 38 S. W. 154.

²² *National, etc., Association v. Brahan*, 193 U. S. 635; affirming 80

Miss. 407; 57 L. R. A. 793; 31 So. 840; *Central Land Co. v. Laidley*, 159 U. S. 103; *Alferwitz v. Borgwardt*, 126 Cal. 201; 58 Pac. 460.

²³ *Ray v. Gas Co.*, 138 Pa. St. 576; 21 Am. St. Rep. 922; 12 L. R. A. 290; 20 Atl. 1065; 21 Atl. 202.

²⁴ *Allen v. Allen*, 95 Cal. 184; 16 L. R. A. 646; 30 Pac. 213.

²⁵ *Central Land Co. v. Laidley*, 159 U. S. 103.

²⁶ *Lufkin v. Galveston*, 58 Tex. 545.

²⁷ *Higgins v. Bordages*, 88 Tex. 458; 53 Am. St. Rep. 770; 31 S. W. 52, 803.

²⁸ *Storrie v. Cortes*, 90 Tex. 283; 35 L. R. A. 666; 38 S. W. 154.

to the surplus of a dog-tax fund, the court holding that the control of the legislature over public corporations was not limited by this clause of the Constitution.²⁹

The distinction here made is not recognized in some states and in many text-books. A dictum by Judge Taney, in *Ohio Life Ins. Co. v. DeBolt*,³⁰ gave rise to the proposition that "where a statute has received a settled exposition, then a contract has been made under it which is good, there is created an 'obligation' which cannot be overturned by decisions overruling the earlier exposition."³¹ This proposition, erroneous as applied to cases coming to the Supreme Court of the United States from state courts, finds support in the broad language used in some cases in which error proceedings to inferior Federal courts were brought³² and has been adopted by some of the state courts.³³ Thus a mortgage was given by a married woman. The decisions of the state courts then rendered held such mortgages to be valid on the ground that her statutory separate estate was converted into her equitable separate estate. This decision was subsequently overruled. It was held that the mortgage, being given before the later decision was rendered, though suit was brought thereon afterwards, must be governed by the early though erroneous construction of the statute.³⁴ So a note given by a public corporation in payment for a bounty for enlistment at a time when the decisions construing the Constitution held such notes to be valid, was held to be valid though such construction was held incorrect when action was brought on such note.³⁵ This limitation upon the

²⁹ *Center School Township v. State*, 150 Ind. 168; 49 N. E. 961.

³⁰ 16 How. (U. S.) 416, 432.

³¹ *Bishop on Contracts* (enlarged edition), § 569. The author's acceptance of this rule as law is the more remarkable because he demonstrates its unsoundness.

³² *Taylor v. Ypsilanti*, 105 U. S. 60; *Douglass v. Pike County*, 101 U. S. 677; *Fairfield v. Gallatin County*, 100 U. S. 47.

³³ *Farrior v. Security Co.*, 92 Ala. 176; 12 L. R. A. 856; 9 So. 532; *Willoughby v. Holderness*, 62 N. H. 227. See obiter in *Lewis v. Symmes*, 61 O. S. 471; 76 Am. St. Rep. 428; 56 N. E. 194.

³⁴ *Farrior v. Security Co.*, 92 Ala. 176; 12 L. R. A. 856; 9 So. 532.

³⁵ *Willoughby v. Holderness*, 62 N. H. 227.

powers of state courts is self-imposed, valid where recognized, but not required by the decisions of the Federal courts. It is recognized indirectly even in cases in which it was held that no question of statutory construction existed. Thus the Supreme Court of California held that a chattel mortgage passed the legal title to the mortgagee.³⁶ In rendering this decision Section 2888 of the Civil Code was entirely overlooked. In a subsequent case it was held that the former decision was not one construing a statute, and that accordingly a contract made in reliance upon the prior decision was not governed thereby, and that it was not impairing the obligation of a contract to overrule the earlier decision.³⁷

It thus appears that a written law is a "law" within the meaning of this clause of the Constitution, while a judicial decision is not. It is, therefore, a necessary question and often a difficult one, to determine whether a judicial decision is based on a written law or not. A recent decision of the Supreme Court of the United States illustrates what it holds to be a decision based on a statute. A Texas statute provided that railroads indebted to the state should pay interest and a certain amount of the principal annually upon so much of the loan as was due on May 1, 1870, and provided to what extent the property of roads which made default in such payments might be held therefor. By statute during the Civil War treasury warrants had been issued to the creditors of the state. The railroads had been obliged to accept these in payment of their accounts, and in turn had paid them over to the state as credits upon the amounts due from them to the state. The Houston and Texas Central Railroad had paid the amount of indebtedness due to the state if credit were given for the state warrants thus paid over. The state insisted that no credit should be given for such warrants and sued to enforce payment of the amount due. The trial court found in favor of the state. The case was then taken to the Court of Civil Appeals, which held that

³⁶ *Berson v. Nunan*, 63 Cal. 550.

³⁷ *Alferwitz v. Borgwardt*, 126 Cal. 201; 58 Pac. 460.

no credit should be given for such warrants; but in other respects modified the judgment of the lower court so as to give exactly the relief prescribed by the state statute first referred to. That part of the decision holding that payment in state warrants should not be credited since they were bills of credit and in aid of rebellion, was reached independent of this statute, and no part of the decision of the Court of Civil Appeals was expressly based thereon. A writ of error was refused by the supreme court of Texas. Error proceedings in the Supreme Court of the United States resulted in a reversal of the judgment of the Texas court of Civil Appeals on the theory that the judgment of the court gave effect to the statute and thus there was a "law" impairing the obligation of contracts.³⁸ Clearly a decision construing a contract, even if erroneous, is not a law impairing the obligation of the contract.³⁹

§1745. Who can object to constitutionality of statute.

The objection that a statute impairs the obligation of contracts can be made only by one who is prejudiced thereby. Parties whose rights are only incidentally affected cannot object.¹ Thus an act of the legislature ending a contract between the state and a canal company, to the possible prejudice of the United States, cannot be attacked as invalid by one whose sole interest was the benefit incidentally received because of the proximity of his lands to the canal.² So a corporation³ or stockholders thereof⁴ who have voluntarily accepted a statutory modification of the corporate charter, cannot thereafter object that such modification impairs the obligation of their contracts

³⁸ Houston, etc., Ry. v. Texas, 177 U. S. 66.

³⁹ Construing a grant of a tract of land in a navigable harbor, and holding it to pass only an easement to build wharves. Land Co. v. Hotel, 134 N. C. 397; *sub nomine*, Shepherd's Point Land Co. v. Hotel, 46 S. E. 748.

¹ Vought v. Ry., 176 U. S. 481 (affirming Vought v. Ry., 58 O. S.

123; 50 N. E. 442); Williams v. Eggleston, 170 U. S. 304; Browne v. Turner, 176 Mass. 9; 56 N. E. 969; People v. Ry., 89 N. Y. 75.

² Vought v. Ry., 176 U. S. 481 (affirming Vought v. Ry., 58 O. S. 123; 50 N. E. 442).

³ Phinney v. Hospital, 88 Md. 633; 42 Atl. 58.

⁴ State v. Light Co., 102 Ala. 594; 15 So. 347.

and no one else can make such objection. After a mortgage was given a law was passed affecting the right of redemption. Subsequently the property was sold at foreclosure sale and bought in by one other than the mortgagee. It was held that whatever the rights of the mortgagee might have been, such purchaser could not attack such statute as impairing the obligation of his contract.⁵

§1746. What is meant by "contracts."

The term "contracts" shows that the protection of this clause is limited to those created by agreement. Rights arising by positive law, not contractual in their nature are not protected by this clause, whatever other clause of the Constitution may be invoked to protect them. Thus a statute providing that purchasers of a railway at a foreclosure sale may incorporate, is not a contract, and may be repealed by the state, notwithstanding this clause.¹ So it has been held that a resolution of a municipal council allowing a street railway to build a road and requiring it to pave between the tracks and for three feet on each side, and to keep such paving in repair is not a contract within the protection of this clause.² So where A began the study of law when certain requirements for admission to the bar were in force and before he applied for admission such requirements were changed, it was held that A had no contractual right to admission under the old requirements; but that to be admitted he must comply with the new requirements.³ A statute providing that a by-law of a beneficial society is not a part of its contract of insurance unless in the certificate of insurance or attached thereto, does not impair the obligation of such contracts as far as concerns by-laws passed after such statute.⁴ The term "contracts" in this clause means genuine

⁵ Hooker v. Burr, 194 U. S. 415.

¹ Grand Rapids, etc., Ry. v. Osborn, 193 U. S. 17 (affirming 130 Mich. 248; 89 N. W. 967); People v. Cook, 148 U. S. 397 (affirming 110 N. Y. 443; 18 N. E. 113).

² Binninger v. New York, 177 N. Y. 199; 69 N. E. 390.

³ *In re Day*, 181 Ill. 73; 50 L. R. A. 519; 54 N. E. 646.

⁴ Hunziker v. Supreme Lodge, — Ky. —; 78 S. W. 201.

contracts.⁵ These may be either express⁶ or implied.⁷ A contract made in another state is protected by this clause of the Constitution.⁸ It does not include quasi-contracts.⁹ A right to recover money paid under duress¹⁰ or by mistake¹¹ is a right resting in quasi-contract and not in contract, and may therefore be taken away by subsequent statute. So a penal liability created by statute may be abolished at any time before judgment, even if an action is pending.¹² Thus a subsequent statute may take away the right to recover money lost at gambling.¹³ However, the repeal of a statute declaring a forfeiture of all interest where usurious interest is contracted for or received does not affect the right to recover the excess of usurious interest over the legal rate, in an action for money had and received.¹⁴

§1747. Judgments.

It is often held by modern courts that a judgment is not a contract within the protection of this clause.¹ Thus a judgment

⁵ See §§ 13, 771.

⁶ *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636.

⁷ *Fisk v. Police Jury*, 116 U. S. 131.

⁸ *Western National Bank v. Reckless*, 96 Fed. 70 (distinguishing *State v. Rahway*, 43 N. J. L. 338; *Rahway Tax Assessors v. State*, 44 N. J. L. 415).

⁹ *Morley v. Ry.*, 146 U. S. 162; *Louisiana v. New Orleans*, 109 U. S. 285; *Nottage v. Portland*, 35 Or. 539; 76 Am. St. Rep. 513; 58 Pac. 883.

¹⁰ *Nottage v. Portland*, 35 Or. 539; 76 Am. St. Rep. 513; 58 Pac. 883. (An invalid assessment paid under protest.)

¹¹ *State v. New Orleans*, 38 La. Ann. 119; 58 Am. Rep. 168.

¹² *Cleveland, etc., Ry. v. Wells*, 65 O. S. 313; 58 L. R. A. 651; 62 N. E. 332.

¹³ *Wilson v. Head*, 184 Mass. 515; 69 N. E. 317.

¹⁴ *Wilson v. Selbie*, 7 S. D. 494; 64 N. W. 537.

¹ *Morley v. Ry.*, 146 U. S. 162; *Louisiana v. Police Jury*, 111 U. S. 716; *Louisiana v. New Orleans*, 109 U. S. 285; *Evans-Snider-Buel Co. v. McFadden*, 105 Fed. 293; 44 C. C. A. 494; 58 L. R. A. 900; *Sherman v. Langham*, 92 Tex. 13; 39 L. R. A. 258; 42 S. W. 961; reversing on rehearing 92 Tex. 13; 39 L. R. A. 258; 40 S. W. 140; *Wyoming National Bank v. Brown*, 9 Wyom. 153; 50 L. R. A. 747; 61 Pac. 465; denying rehearing, 7 Wyom. 494; 75 Am. St. Rep. 935; 53 Pac. 291. "Such duty (i. e., to pay a judgment) is created by the statute and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*." *Morley v. Ry.*, 146 U. S.

restraining the collection of an inheritance tax may, on appeal, be reversed because of a retroactive law, passed while such appeal was pending curing defects in the original act.²

A judgment rendered on a contract is as much protected by this clause as was the original contract.³

The rate of interest which a judgment bears is entirely a matter of statute, and may be altered by statute at any time as to the interest subsequently accruing.⁴ A judgment rendered on a contract under a statute providing that such a judgment should bear the contract rate of interest, has been held so far a contract that the rate of interest cannot thereafter be changed.⁵ Where a judgment is rendered under a statute providing for ten per cent interest on judgments, a subsequent statute reducing the rate of interest to eight per cent cannot affect such judgment.⁶ If a judgment is based on a tort, interest thereon is not a contract within the meaning of this clause.⁷ A judg-

162, 169 (affirming *Prouty v. Ry.*, 95 N. Y. 667, which was decided without report on the authority of *O'Brien v. Young*, 95 N. Y. 428; 47 Am. Rep. 64).

² *Ferry v. Campbell*, 110 Ia. 290; 50 L. R. A. 92; 81 N. W. 604.

³ *Fisk v. Police Jury*, 116 U. S. 131.

⁴ *Morley v. Ry.*, 146 U. S. 162 (affirming *Prouty v. Ry.*, 95 N. Y. 667, which was decided without report on the authority of *O'Brien v. Young*, 95 N. Y. 428, 667; 47 Am. Rep. 64); *Read v. Mississippi County*, 69 Ark. 365; 86 Am. St. Rep. 202; 63 S. W. 807; *O'Brien v. Young*, 95 N. Y. 428; 47 Am. Rep. 64; *Wyoming National Bank v. Brown*, 9 Wyom. 153; 50 L. R. A. 747; 61 Pac. 465; denying rehearing of 7 Wyom. 494; 75 Am. St. Rep. 935; 53 Pac. 291. *Contra*, *Cox v. Marlatt*, 36 N. J. L. 389; 13 Am. Rep. 454. Such a statute is, if possible, construed to apply only to judg-

ments thereafter rendered. *Texas, etc., Ry. v. Anderson*, 149 U. S. 237.

⁵ *Getto v. Friend*, 46 Kan. 24; 26 Pac. 473; *Bond v. Dolby*, 17 Neb. 491; 23 N. W. 351.

⁶ "It is unquestionably true that a judgment partakes of the nature of a contract sufficiently to supersede the original contract or cause of action both as to principal and interest. The original contract or cause of action becomes merged, and the judgment constitutes a new and liquidated debt. This debt and the liabilities for interest thereon, as provided by statute at the date of the judgment, are obligations binding upon the debtor till the judgment is reversed or satisfied." *Butler v. Rockwell*, 17 Colo. 290, 295; 29 Pac. 468; *sub nomine*, *Rockwell v. Butler*, 17 L. R. A. 611.

⁷ *Freeland v. Williams*, 131 U. S. 405; *Louisiana v. Police Jury*, 111 U. S. 716; *Louisiana v. New Orleans*, 109 U. S. 285; *Sherman v.*

ment cannot be so modified by a subsequent statute as to be made unenforceable.⁸ This is because it is a vested right and as such is protected by another constitutional provision and not because it is a contract.⁹ However, some courts have explained this rule on the theory that for this purpose at least, a judgment is, in the language of Blackstone,¹⁰ to be "a contract of the highest nature."¹¹ Thus a judgment based on a stock liability cannot be changed as to its scope and legal effect by a subsequent statute.¹² So the report made by commissioners appointed under a statute which empowered them to determine the existence and amount of a claim against the city, is regarded after confirmation by the court as a judgment, so that the subsequent repeal of the statute under which the report was made cannot deprive the injured party of his interest in the amount so fixed.¹³ A statute which attempts to provide that a judgment shall cease to be a lien or charge after a certain time, is not a statute of limitation, since even bringing suit on the judgment within the time limited will not prevent it, under the terms of the statute, from ceasing to be a lien or a charge at the end of such time, and so is invalid as to pre-existing judgments.¹⁴ So a statute passed after a judgment as to the validity of a title bought at an execution sale providing that the prevailing party cannot enforce such judgment unless he compensates

Langham, 92 Tex. 13; 39 L. R. A. 258; 42 S. W. 961; reversing on rehearing, 40 S. W. 140.

⁸ *People v. Buffalo*, 140 N. Y. 300; 37 Am. St. Rep. 563; 35 N. E. 485; *Ratcliffe v. Anderson*, 31 Gratt. (Va.) 105; 31 Am. Rep. 716; *Griffin's Executor v. Cunningham*, 20 Gratt. (Va.) 31.

⁹ *Livingston v. Livingston*, 173 N. Y. 377; 93 Am. St. Rep. 600; 61 L. R. A. 800; 66 N. E. 123.

¹⁰ Black, Com. II, 465.

¹¹ *People v. Buffalo*, 140 N. Y. 300; 37 Am. St. Rep. 563; 35 N. E. 485. "Immediately upon the rendition of a judgment or decree for

money, there arises a contract against the party adjudged to pay in favor of him for whose benefit it is awarded which the legislature has no power to impair." *Martin v. Land Co.*, 94 Va. 28, 36; 26 S. E. 591.

¹² *Martin v. Land Co.*, 94 Va. 28; 26 S. E. 591.

¹³ *People v. Buffalo*, 140 N. Y. 300; 37 Am. St. Rep. 563; 35 N. E. 485.

¹⁴ *Raught v. Lewis*, 24 Wash. 47; 63 Pac. 1104; *Palmer v. Laberee*, 23 Wash. 409; 63 Pac. 216; *Bettman v. Cowley*, 19 Wash. 207; 40 L. R. A. 815; 53 Pac. 53.

the purchaser is invalid.¹⁵ So a decree for alimony rendered when the court had no power to modify it subsequently, cannot be modified under a subsequent statute conferring such power.¹⁶

§1748. Taxes and appropriations.

Liability to pay taxes and assessments may be quasi-contract, but is not genuine contract. This clause does not therefore make invalid statutes which tax pre-existing contract rights.¹ So a statute requiring lessees to pay the tax on the property leased and to deduct it from the rent is valid.² The imposition of a specific tax,³ such as a license,⁴ or a privilege tax,⁵ is not an implied contract that such tax will not be increased. Remedies for collecting taxes due and unpaid,⁶ or on property unlawfully omitted from the assessment,⁷ or for enforcing assessments for improvements made theretofore,⁸ may be changed after the tax or assessment is levied. So a statute may provide that the auditor shall place on the duplicate, taxes omitted before the passage of the act,⁹ or may change the penalty for delinquencies.¹⁰ This rule is not especially applicable to taxes, since remedies for express contracts may be changed.¹¹ A statute

¹⁵ *Gilman v. Tucker*, 128 N. Y. 190; 26 Am. St. Rep. 464; 13 L. R. A. 304; 28 N. E. 1040.

¹⁶ *Livingston v. Livingston*, 173 N. Y. 377; 93 Am. St. Rep. 600; 61 L. R. A. 800; 66 N. E. 123.

¹ *Southern, etc., Association v. Norman*, 98 Ky. 294; 56 Am. St. Rep. 367; 31 L. R. A. 41; 32 S. W. 952; *Commonwealth v. Ry.*, 150 Pa. St. 234; 24 Atl. 609; *Commonwealth v. Canal Co.*, 150 Pa. St. 245; 24 Atl. 599; *Commonwealth v. Ry.*, 129 Pa. St. 429, 454; 18 Atl. 406, 410.

² *Vermont, etc., Ry. v. Ry.*, 63 Vt. 1, 29; 10 L. R. A. 562; 21 Atl. 262, 731.

³ *Adams v. Railroad Co.*, 77 Miss. 194; 60 L. R. A. 33; 24 So. 200, 317; 28 So. 956.

⁴ *Bishoff v. State*, 43 Fla. 67; 30

So. 808; *Baker v. Lexington (Ky.)*, 53 S. W. 16; *State v. Gazlay*, 5 Ohio 15. But a statute requiring a new license has been held invalid. *Wright v. Atlanta*, 54 Ga. 645.

⁵ *Western Union Telegraph Co. v. Harris (Tenn. Ch. App.)*, 52 S. W. 748.

⁶ *Flock v. Smith*, 65 N. J. L. 224; 47 Atl. 442; *Willis v. Heighway*, 40 S. C. 476; 19 S. E. 135.

⁷ *State v. Weyerhauser*, 72 Minn. 519; 75 N. W. 718.

⁸ *Hall v. Boston*, 177 Mass. 434; 59 N. E. 68.

⁹ *Gager v. Prout*, 48 O. S. 89; 26 N. E. 1013.

¹⁰ *Webster v. Auditor General*, 121 Mich. 668; 80 N. W. 705.

¹¹ See-§ 1766.

appropriating fines and forfeitures to the use of public corporations,¹² or to the use of informers,¹³ is not a contract, and may be repealed by subsequent statute. So a statute offering a bounty may be repealed even as to persons who have expended money for the purpose of earning such bounty.¹⁴

§1749. Marriage.

Marriage is a status and not a contract within the meaning of this clause.¹ Hence a pre-existing marriage may be dissolved by a legislative divorce where valid otherwise,² or by a divorce rendered under general laws passed after the marriage.³

§1750. Public offices.

A public officer has no property right to future tenure of his office, and does not hold it by contract with the state. Accordingly a statute which abolishes an office or reduces its term does not impair the obligation of contracts.¹ Thus the office of mayor,² or state pomologist,³ may be abolished. In North

¹² *Shell v. Beeland*, 123 Ala. 569; 26 So. 342; *Harold v. Herrington*, 95 Ala. 395; 11 So. 131; *Watson Seminary v. Pike County*, 149 Mo. 57; 45 L. R. A. 675; 50 S. W. 880.

¹³ *Cushman v. Hale*, 68 Vt. 444; 35 Atl. 382.

¹⁴ *Salt Co. v. East Saginaw*, 13 Wall. (U. S.) 373; affirming 19 Mich. 259; 2 Am. Rep. 82.

¹ *State v. Tutty*, 41 Fed. 753; 7 L. R. A. 50; *Berthelemy v. Johnson*, 3 B. Mon. (Ky.) 90; 38 Am. Dec. 179; *Baughman v. Baughman*, 7 Ohio Dec. 433; *Grant v. Grant*, 12 S. C. 29; 32 Am. Rep. 506; *State v. Duket*, 90 Wis. 272; 48 Am. St. Rep. 928; 31 L. R. A. 515; 63 N. W. 83.

² *Maynard v. Hill*, 125 U. S. 190; *Noel v. Ewing*, 9 Ind. 37; *Maguire v. Maguire*, 7 Dana (Ky.) 181.

³ *McCraney v. McCraney*, 5 Ia. 232; 68 Am. Dec. 702; *Clark v.*

Clark, 10 N. H. 380; 34 Am. Dec. 165; *State v. Duket*, 90 Wis. 272; 48 Am. St. Rep. 928; 31 L. R. A. 515; 63 N. W. 83.

¹ In many states such statutes are Rep. 801; 53 L. R. A. 837; 49 Atl. unconstitutional because of other provisions of state constitutions. These questions are of course not discussed here. *Butler v. Commonwealth*, 10 How. (U. S.) 402; *Vincenheller v. Reagan*, 69 Ark. 460; 64 S. W. 278; *Coffin v. State*, 15 Ind. 157; *Donaghy v. Macy*, 167 Mass. 178; 45 N. E. 87; *Hoboken v. Gear*, 27 N. J. L. 265; *Commonwealth v. Moir*, 199 Pa. St. 534; 85 Am. St. 351; 53 L. R. A. 837; 49 Atl. 351.

² *Commonwealth v. Moir*, 199 Pa. St. 534; 85 Am. St. Rep. 801; 53 L. R. A. 837; 49 Atl. 351.

³ *Vincenheller v. Reagan*, 69 Ark. 460; 64 S. W. 278.

Carolina a public office was once held to be so far property that a statute abolishing it impaired the obligation of contracts.⁴ Even in this state if the statute creating the office provided for a suspension of the officer under certain facts, a suspension under such facts did not impair the obligation of contracts.⁵ The earlier decisions have finally been overruled, and North Carolina has adopted the rule held by other states, that a public officer has no contractual right to his office.⁶ As far as his salary has been earned, however, he has a contract right therein, which is protected by this clause.⁷ His right under certain circumstances by reason of length of service to share in a pension fund created in part by deductions from his salary is, if a property or contract right, not destroyed by a subsequent statute abolishing his office. Hence such statute is not unconstitutional.⁸ Persons who have contracts with the state have no property rights in the state agencies with which they deal. Hence, statutes changing such state agencies do not impair the obligation of contracts.⁹

§1751. Invalid contracts.

An invalid contract is not protected by this clause.¹ Thus a contract which is illegal,² or without consideration,³ or

⁴ *State's Prison v. Day*, 124 N. C. 362; 46 L. R. A. 295; 32 S. E. 748; *Hoke v. Henderson*, 15 N. C. 1; 25 Am. Dec. 677.

⁵ *State v. Wilson*, 121 N. C. 425, 480; 61 Am. St. Rep. 672; (opinion in 61 Am. St. Rep. 672 not on this point), 28 N. E. 554.

⁶ *Mial v. Ellington*, 131 N. C. 134; 46 S. E. 961.

⁷ *Butler v. Commonwealth*, 10 How. (U. S.) 402; *Moore v. State*, — Neb. —; 93 N. W. 733; *Ex parte Lawrence*, 1 O. S. 431.

⁸ *People v. Coler*, 173 N. Y. 103; 65 N. E. 956.

⁹ *New York v. Squire*, 145 U. S. 175; *Isenberg v. Selva*, 103 Ky. 200; 44 S. W. 974; *Shotwell v. Ry.*,

69 Miss. 541; 11 So. 455; *Nye v. Ross*, 17 R. I. 733; 16 L. R. A. 798; 24 Atl. 777.

¹ *Folsom v. Ninety-Six Township*, 59 Fed. 67.

² *Durkee v. People*, 155 Ill. 354; 46 Am. St. Rep. 340; 40 N. E. 626. As where it is usurious. *Hardin v. Trimmer*, 27 S. C. 110; 3 S. E. 46. Or where an assignment to evade exemption laws is forbidden by statute. *Bishop v. Middleton*, 43 Neb. 10; 26 L. R. A. 445; 61 N. W. 129.

³ *Louisiana v. New Orleans*, 109 U. S. 285; *Lord v. Litchfield*, 36 Conn. 116; 4 Am. Rep. 41; *Hardy v. Waltham*, 7 Pick. (Mass.) 110; *State v. Gilmore*, 141 Mo. 506; 42

indefinite,⁴ or *ultra vires*,⁵ or where conditions precedent have not been complied with, as where certain franchises were to vest when electric light works were put into successful operation and this was never done,⁶ or where the necessary consent of the city authorities was never obtained,⁷ is not protected against impairment by subsequent legislation. So an unconstitutional statute,⁸ or ordinance,⁹ cannot confer contract rights within the protection of this clause.¹⁰

§1752. Statutes validating invalid contracts.

The right to avoid a contract under which the party avoiding it has received a valuable consideration is not a contract right; and therefore a subsequent statute which destroys this right to avoid the contract does not impair the obligation of contracts.¹ Thus a law making legal a past payment of license fees for the sale of intoxicating liquors made to the

S. W. 817; *People v. Commissioners*, 47 N. Y. 501; *Synod of Dakota v. State*, 2 S. D. 366; 14 L. R. A. 418; 50 N. W. 632. So with contracts to exempt from taxation. *Lord v. Litchfield*, 36 Conn. 116; 4 Am. Rep. 41; overruling *Atwater v. Woodbridge*, 6 Conn. 223; 16 Am. Dec. 46; *Bradley v. McAtee*, 7 Bush. (Ky.) 667; 3 Am. Rep. 309.

⁴ *Tacoma Land Co. v. Young*, 18 Wash. 495; 52 Pac. 244.

⁵ *New Orleans v. Waterworks Co.*, 142 U. S. 79; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674; *City of Walla Walla v. Water Co.*, 172 U. S. 1; *Westminster Water Co. v. Westminster*, — Md. —; 56 Atl. 990; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739; 50 L. R. A. 142; 35 S. E. 994.

⁶ *Capital City, etc., Co. v. Tallahassee*, 42 Fla. 462; 28 So. 810.

⁷ *Underground R. R. v. New York*, 116 Fed. 952.

⁸ *State v. Stearns*, 72 Minn. 200; 75 N. W. 210; reversed on another

point in *Stearns v. Minnesota*, 179 U. S. 223.

⁹ *Covington v. Commonwealth* (Ky.), 39 S. W. 836.

¹⁰ A common illustration of this rule is the statute purporting to bargain away the police power. See § 1758.

¹ *Watson v. Mercer*, 8 Pet. (U. S.) 88; *Satterlee v. Matthewson*, 2 Pet. (U. S.) 380; affirming 16 S. & R. (Pa.) 169; *Burget v. Merritt*, 155 Ind. 143; 57 N. E. 714; *Wistar v. Foster*, 46 Minn. 484; 24 Am. St. Rep. 241; 49 N. W. 247; *Farmsworth, etc., Co. v. Trust Co.*, 84 Minn. 62; 86 N. W. 877; *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20; 49 Pac. 446; *Bleakney v. Bank*, 17 S. & R. (Pa.) 64; 17 Am. Dec. 635; *Swope v. Jordan*, 107 Tenn. 166; 64 S. W. 52; *Shields v. Land Co.*, 94 Tenn. 123; 45 Am. St. Rep. 700; 26 L. R. A. 509; 28 S. W. 668; *Romaine v. State*, 7 Wash. 215; 34 Pac. 924. "It cannot be said that such legislation, though

wrong officers,² or one requiring a county to pay money received by it on invalid bonds,³ or one making valid a contract for paving a city street, invalid when made because the statutory notice had not been given,⁴ is not affected by this clause.

If the parties have made an actual agreement upon a valuable consideration, a subsequent statute may make such contract valid even if when made it was void and not merely voidable.⁵ Thus a statute making valid a prior contract of a foreign corporation which when made is invalid by reason of omission to comply with the statute requiring a certificate of incorporation and a statement of its condition,⁶ or because of the omission of the corporation to pay to the state the proportion of its dividends required by statute,⁷ or one making valid a conveyance by expectant heirs in certain cases,⁸ or by a married woman after a divorce has been granted to her without proper service on her husband, although he had actual notice of the pendency of the action,⁹ or one curing the defective acknowledgment of a corporate charter,¹⁰ or curing a defect in a conveyance, which consisted in its acknowledgment before a notary who was a stockholder in a corporation which was a party thereto,¹¹ or making contracts tainted with usury, valid upon

retrospective in its nature, impaired the obligation of the contract. It rather enables the parties to enforce the contract that they intended to make." *Gross v. Mortgage Co.*, 108 U. S. 477, 488; quoted in *Butler v. Loan Association*, 97 Tenn. 679, 687; 37 S. W. 385.

² *State v. Patterson*, 53 N. J. L. 120; 20 Atl. 828.

³ *New York Life Ins. Co. v. Cuyahoga Co.*, 106 Fed. 123; 45 C. C. A. 233. See § 1064. *State v. Dickerman*, 16 Mont. 278; 40 Pac. 698.

⁴ *Windsor v. Des Moines*, 101 Ia. 343; 70 N. W. 214.

⁵ *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 236.

⁶ *Clark v. Darr*, 156 Ind. 692; 60 N. E. 688; *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20; 49 Pac.

446; *Swope v. Gordan*, 107 Tenn. 166; 64 S. W. 52; *Butler v. Loan Association*, 97 Tenn. 679; 37 S. W. 385. To the same effect, see *Gross v. Mortgage Co.*, 108 U. S. 477; *United States Mortgage Co. v. Gross*, 93 Ill. 483.

⁷ *Bleakney v. Bank*, 17 S. & R. (Pa.) 64; 17 Am. Dec. 635.

⁸ *Burget v. Merritt*, 155 Ind. 143; 57 N. E. 714.

⁹ *Wistar v. Foster*, 46 Minn. 484; 24 Am. St. Rep. 241; 49 N. W. 247.

¹⁰ *Shields v. Land Co.*, 94 Tenn. 123; 45 Am. St. Rep. 700; 26 L. R. A. 509; 28 S. W. 668.

¹¹ *Steger v. Traveling Men's, etc., Association*, 208 Ill. 236; 70 N. E. 236.

certain terms,¹² or one making valid a contract invalid when made because unstamped,¹³ or contracts invalid when made because made on Sunday,¹⁴ is in each case valid.

A subsequent curative act may itself become a part of the contract upon renewal so that it cannot be repealed thereafter to the impairment of the obligation of such contract. Thus a loan was made by a loan association when the law then in force made such loan usurious on account of the premiums charged. Subsequently the statute was modified so as to permit such loans. The loan was then renewed, a new note being given. Subsequently this modification of the statute was itself repealed. It was held that the loan made valid by its renewal under the second statute could not be made invalid by the third.¹⁵ However, where nothing of value has been received by the party seeking to avoid the contract, it seems that a curative act is unconstitutional. Thus under an unconstitutional statute warrants were given for the scalps of certain wild animals. It was held that a subsequent curative act, attempting to validate such warrants was itself unconstitutional.¹⁶

§1753. Executory and executed contracts.

This clause is more generally invoked to protect executory contracts,¹ but it may apply as well to executed contracts.²

¹² Ewell v. Daggs, 108 U. S. 143; Petterson v. Berry, 125 Fed. 902; 60 C. C. A. 610; Montgomery, etc., Association v. Robinson, 69 Ala. 413; Bibb County Loan Association v. Richards, 21 Ga. 592; Edworthy v. Loan Association, 114 Ia. 220; 86 N. W. 315; Iowa, etc., Association v. Heidt, 107 Ia. 297; 70 Am. St. Rep. 197; 43 L. R. A. 689; 77 N. W. 1050; Hardaway v. Lilly (Tenn. Ch. App.), 48 S. W. 712; Smoot v. Building Association, 95 Va. 686; 41 L. R. A. 589; 29 S. E. 746.

¹³ State v. Norwood, 12 Md. 195. (The mere repeal of the stamp act is held to make such contracts valid.)

¹⁴ Berry v. Clary, 77 Me. 482; 1 Atl. 360.

¹⁵ Edworthy v. Loan Association, 114 Ia. 220; 86 N. W. 315.

¹⁶ Felix v. Board, 62 Kan. 832; 84 Am. St. Rep. 424; 62 Pac. 667.

¹ Stephens v. R. R., 109 Cal. 86; 50 Am. St. Rep. 17; 29 L. R. A. 751; 41 Pac. 783; McMurray v. Sidwell, 155 Ind. 560; 80 Am. St. Rep. 255; 58 N. E. 722.

² Houston, etc., Ry. v. Texas, 177 U. S. 66; Hamilton v. Brown, 161 U. S. 256; Houston, etc., Ry. v. Ry., 70 Tex. 649; 8 S. W. 498. "Neither party could undo what had been fully executed and completed, and the law therefore implies a contract

Thus if lands have been granted by the state,³ or dedicated to a public use, such as a park so as to confer easements upon the abutting property owners,⁴ or bought at a tax sale,⁵ or acquired otherwise,⁶ such conveyances are held to be executed contracts, and therefore statutes which take away such rights are held to be invalid as impairing the obligation of contracts. This principle was applied by the Supreme Court of the United States at an early date,⁷ before there was a provision in the Constitution of the United States restraining a state from depriving persons of private property without due process of law. Accordingly, at that time, private property could be protected against state action only by an extension of the clause protecting the obligation of contracts. The precedent thus set has been followed in the later cases, and has resulted in protecting conveyances which were not properly speaking the result of contract. Executed conveyances are thus protected even if without consideration.⁸ So a husband's right to reduce his wife's choses in action to possession cannot be taken away by a subsequent statute.⁹ While executed conveyances are thus protected, the legislature may change the laws of descent so as to make property pass by descent to a child previously illegitimate but thereby made legitimate,¹⁰ or may

that neither party will attempt to do so, or in other words the law implies a contract that the payments made shall not be thereafter repudiated or denied." *Houston, etc., Ry. v. Texas*, 177 U. S. 66, 98.

³ *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Minnesota v. R. R.*, 97 Fed. 353.

⁴ *Chicago v. Ward*, 169 Ill. 392; 61 Am. St. Rep. 185; 38 L. R. A. 849; 48 N. E. 927.

⁵ *Tracy v. Reed*, 38 Fed. 69; 2 L. R. A. 773; *St. Louis, etc., Ry. Co. v. Alexander*, 49 Ark. 190; 4 S. W. 753; *Hull v. State*, 29 Fla. 79; 30 Am. St. Rep. 95; 16 L. R. A. 308; 11 So. 97; *State v. Bradshaw*,

39 Fla. 137; 22 So. 296; *Morgan v. Miami County*, 27 Kan. 89; *Merrill v. Dearing*, 32 Minn. 479; 21 N. W. 721; *Roberts v. Bank*, 8 N. D. 504; 79 N. W. 1049; *State v. Flypaa*, 3 S. D. 586; 54 N. W. 599; *Robinson v. Howe*, 13 Wis. 341.

⁶ *Burt v. Busch*, 82 Mich. 506; 46 N. W. 790.

⁷ *Fletcher v. Peck*, 6 Cranch (U. S.) 87.

⁸ *Franklin County Grammar School v. Bailey*, 62 Vt. 467; 10 L. R. A. 405; 20 Atl. 820.

⁹ *Leete v. Bank*, 141 Mo. 574; 42 S. W. 1074.

¹⁰ *Hughes v. Murdock*, 45 La. Ann. 935; 13 So. 182.

make additional provisions for escheat,¹¹ or restrict the power to devise realty.¹² So the exercise of the right of eminent domain is not an unconstitutional impairment of the obligation of contracts.¹³ A contingent claim to a reversion expectant on the dissolution of a corporation is not such a vested right that it cannot be taken away by a statute authorizing the sale of such realty under a judicial sale.¹⁴

§1754. Corporate charters.

An extension of the doctrine that executed contracts, including conveyances, were protected by this clause, led to the doctrine that the charter of a corporation might contain a contract between the corporation and the state, within the protection of this clause.¹ This rule does not mean that every provision of the charter of a corporation must be a contract, but merely that as far as it is contractual in the contemplation of the law, it is protected by this constitutional provision.² This principle is often recognized by the courts.³ Thus a right to sell lands formerly used for toll-house purposes to any purchaser,⁴ or a right to maintain toll-gates on a plank-road and to take toll,⁵ or a right that no competing turnpike should be estab-

¹¹ *Hamilton v. Brown*, 161 U. S. 256.

¹² *Patton v. Patton*, 39 O. S. 590.

¹³ *Baltimore, etc., Road v. Ry.*, 81 Md. 247; 31 Atl. 854.

¹⁴ *Bass v. Roanoke, etc., Co.*, 111 N. C. 439; 19 L. R. A. 247; 16 S. E. 402.

¹ *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518. See discussion in *Greenwood v. Ry.*, 105 U. S. 13.

² It is "not the charter which is protected but only any contract the charter may contain." *Stone v. Mississippi*, 101 U. S. 814, 817.

³ *Houston, etc., Ry. v. Texas*, 170 U. S. 243; *Georgia, etc., Co. v.*

Smith, 128 U. S. 174; *Chicago, etc., Ry. v. Iowa*, 94 U. S. 155; *Central Trust Co. v. Ry.*, 82 Fed. 1; *Foster v. Road Co. (Ky.)*, 65 S. W. 840; *Highland Park v. Road Co.*, 95 Mich. 489; 55 N. W. 382; *Turnpike Co. v. Davidson County*, 106 Tenn. 258; *sub nomine*, *Nashville, etc., Turnpike Co. v. Davidson County*, 61 S. W. 68; *State v. Turnpike Co. (Tenn. Ch. App.)*, 61 S. W. 1096.

⁴ *Foster v. Road Co. (Ky.)*, 65 S. W. 840. (Hence a statute providing that they can be sold only to the owner of abutting land is invalid.)

⁵ *Highland Park v. Road Co.*, 95 Mich. 489; 55 N. W. 382.

lished,⁶ or a land grant offered for each mile of road constructed,⁷ are contract rights that cannot be taken away by subsequent legislation. So a grant of power by a legislature to a railroad to fix rates⁸ may constitute a contract. Not every provision in the charter is contractual in its nature, however. Only provisions which either vest property in the corporation or may influence persons to take stock in the corporation constitute contracts.⁹ Power to consolidate with competing corporations may be taken away,¹⁰ and so may power to receive subscriptions from municipal corporations,¹¹ or a statute fixing the proportion of bonds to stock.¹² These rules, however, have little application in contract law, since charters of corporations, conveyances and the like are usually classed with contracts solely for invoking the protection of this clause. Further discussion here is therefore unnecessary.

§1755. Rights and liabilities of stockholders.

The rights of stockholders in the corporation of which they are members, are contract rights, the obligation of which cannot be impaired by subsequent legislation. Thus the right of stockholders to vote in proportion to the number of shares held cannot be altered.¹ But under a constitution reserving

⁶ Nashville, etc., Turnpike Co. v. Davidson Co., 106 Tenn. 258; 61 S. W. 68.

⁷ Houston, etc., Ry. v. Texas, 170 U. S. 243. (After an important part of the road has been completed.)

⁸ Pingree v. Ry., 118 Mich. 314; 53 L. R. A. 274; 76 N. W. 635; (citing New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362; Chicago B. & Q. R. Co. v. Iowa, 94 U. S. 155; Ruggles v. Illinois, 108 U. S. 526;) Stone v. Yazoo, etc., Ry. Co., 62 Miss. 607; 52 Am. Rep. 193.

⁹ Pearsall v. Ry., 161 U. S. 646.

¹⁰ Pearsall v. Ry., 161 U. S. 646; (reversing 73 Fed. 933).

¹¹ Norton v. Taxing District, 129 U. S. 479; Wilkes County v. Call, 123 N. C. 308; 44 L. R. A. 252; 31 S. E. 481; (citing Galveston, etc., Ry. v. Texas, 170 U. S. 226; Citizens', etc., Association v. Perry County, 156 U. S. 692; Norton v. Brownville, 129 U. S. 479; and citing as overruled, Concord v. Portsmouth Sav. Bank, 92 U. S. 625; Fairfield v. Gallatin County, 100 U. S. 47).

¹² C. H. Venner Co. v. Steel Corporation, 116 Fed. 1012.

¹ Tucker v. Russell, 82 Fed. 263.

the power to alter, amend or repeal future acts of incorporation, cumulative voting may be provided for by statute.² So an amendment cannot authorize a pre-existing mutual insurance company to transform itself into a joint-stock company against the will of one pre-existing member.³ So a member of a beneficial association who has when he becomes a member, a right to change the beneficiary of his insurance certificate cannot thereafter be deprived of such right.⁴ So the rights of a withdrawing shareholder of a building association cannot be impaired by subsequent legislation.⁵ On the other hand, a change in the method of enforcing existing rights is valid. Thus a provision in effect allowing dividends to be paid in property instead of in money is valid.⁶ The liability of a stockholder to the creditors of a corporation is generally held to be so far contractual in its nature that it cannot be modified by legislation subsequent to the debts involved,⁷ either increasing such liability, as where an assessment on stock, fully paid up, is authorized,⁸ or diminishing it, as where a subsequent statute repeals a prior statute which imposed a personal liability on the stockholders in an amount in addition to that paid in on their stock equal to the par value thereof.⁹ So a statute making valid certain defectively attempted incorporations, does not affect a prior right of action against the incorporators personally for the debts of such organization.¹⁰

² *Looker v. Maynard*, 179 U. S. 46; *Gregg v. Smelting Co.*, 164 Mo. 616; 65 S. W. 312.

³ *Schwarzwaelder v. German Mutual Fire Ins. Co.*, 59 N. J. Eq. 589; 44 Atl. 769.

⁴ *Peterson v. Gibson*, 191 Ill. 365; 85 Am. St. Rep. 263; 54 L. R. A. 836; 61 N. E. 127; (citing *Baldwin v. Begley*, 185 Ill. 180; 56 N. E. 1065; *Association v. Kentner*, 188 Ill. 431; 58 N. E. 966).

⁵ *Intiso v. Loan Association*, 68 N. J. L. 588; 53 Atl. 206.

⁶ *Merchant v. Land Association*, 56 Minn. 327; 57 N. W. 931.

⁷ *Hawthorne v. Calef*, 2 Wall. (U. S.) 10; *Webster v. Bowers*, 104 Fed. 627; *Evans v. Nellis*, 101 Fed. 920; *Central, etc., Association v. Ins. Co.*, 70 Ala. 120; *Woodworth v. Bowles*, 61 Kan. 569; 60 Pac. 331; *Providence Savings Institution v. Jackson, etc., Bathing Rink*, 52 Mo. 552.

⁸ *Enterprise Ditch Co. v. Moffit*, 58 Neb. 642; 76 Am. St. Rep. 122; 45 L. R. A. 647; 79 N. W. 560.

⁹ *Barton National Bank v. Atkins*, 72 Vt. 33; 47 Atl. 176.

¹⁰ *Christian v. Bowman*, 49 Minn. 99; 51 N. W. 663.

§1756. Grant of franchises.

A grant of public franchises may be in such form that when duly accepted it constitutes a contract within the protection of this clause of the constitution.¹ Thus a grant of franchises, such as a right of way, to a railroad by a municipal corporation,² or by the state,³ or a grant by a municipal corporation to a street railway company of a right of way in the streets,⁴

¹ *City Ry. Co. v. Ry.*, 166 U. S. 557; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50; *Terre Haute, etc., R. R. v. State*, 159 Ind. 438; 65 N. E. 401; *Burlington v. Burlington Street Ry. Co.*, 49 Ia. 144; 31 Am. Rep. 145; *New Orleans v. Telegraph Co.*, 40 La. Ann. 41; 8 Am. St. Rep. 502; 3 So. 533; *Commonwealth v. Boston*, 97 Mass. 555; *St. Paul v. Ry.*, 63 Minn. 330; 34 L. R. A. 184; 63 N. W. 267; 65 N. W. 649; 68 N. W. 458; *Cape May, etc., Ry. v. Cape May*, 35 N. J. Eq. 419; *Cincinnati, etc., Ry. Co. v. Carthage*, 36 O. S. 631; *Cincinnati Street Ry. Co. v. Smith*, 29 O. S. 291; *Ashland v. Wheeler*, 88 Wis. 607; 60 N. W. 818.

² *Iron Mountain Ry. v. Memphis*, 96 Fed. 113; 37 C. C. A. 410; *Port of Mobile v. Ry. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342; 4 So. 166; *Workman v. Ry. Co.*, 129 Cal. 536; 62 Pac. 185, 316; *Arcata v. Ry. Co.*, 92 Cal. 639; 28 Pac. 676; *Snell v. Chicago*, 133 Ill. 413; 8 L. R. A. 858; 24 N. E. 532; *East Louisiana R. Co. v. New Orleans*, 46 La. Ann. 526; 15 So. 157; *Cincinnati, etc., Ry. Co. v. Carthage*, 36 O. S. 631; *Houston, etc., R. R. Co. v. Ry. Co.*, 70 Tex. 649; 8 S. W. 498; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88.

³ *New York, etc., Ry. v. Pennsylvania*, 153 U. S. 628; *Commonwealth*

v. Ry., — Ky. —; 54 L. R. A. 916; 64 S. W. 451.

⁴ *City Ry. Co. v. Ry.*, 166 U. S. 557; 64 Fed. 647, and affirming 56 Fed. 746; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296; 22 C. C. A. 334; *Baltimore, etc., Guarantee Co. v. Baltimore*, 64 Fed. Rep. 153; *Africa v. Knoxville*, 70 Fed. Rep. 729; *Detroit, etc., Ry. v. Detroit*, 64 Fed. 628; 26 L. R. A. 667; 12 C. C. A. 365; *Coast Line Ry. Co. v. Savannah*, 30 Fed. Rep. 646; *Citizens' Street Ry. Co. v. Memphis*, 53 Fed. Rep. 715; *Citizens' Street Ry. Co. v. Ry.*, 56 Fed. 746; *Birmingham, etc., Ry. v. Ry.*, 79 Ala. 465; 58 Am. Rep. 615; *The People v. Ry. Co.*, 118 Ill. 113; 7 N. E. 116; *Parmelee v. Chicago*, 60 Ill. 267; *City Ry. Co. v. Ry. Co.*, — Ind. —; 52 N. E. 157; *Williams v. Ry. Co.*, 130 Ind. 71; 30 Am. St. Rep. 201; 15 L. R. A. 64; 29 N. E. 408; *Western Paving & Supply Co. v. Citizens' Street Ry. Co.*, 128 Ind. 525; 25 Am. St. Rep. 462; 10 L. R. A. 770; 26 N. E. 188; 28 N. E. 88; *Sioux City Street Ry. Co. v. Sioux City*, 78 Ia. 367; 43 N. W. 224; *Kansas City v. Corrigan*, 86 Mo. 67; *Hovelman v. Ry. Co.*, 79 Mo. 632; *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; 2 L. R. A. 255; 18 N. E. 692; reversing 45 Hun 519; *Mayor, etc., of New York v. Ry. Co.*, 32 N. Y. 261; *Wright v. Light Co.*,

or a grant to a railroad of the right of erecting a freight house upon a levee,⁵ or a grant of a right to construct telegraph⁶ or telephone lines in public streets,⁷ or electric lights and power,⁸ or to construct and maintain electric conductors,⁹ or to lay water pipes,¹⁰ or gas pipes,¹¹ or permission to an individual to build a vault under an alley,¹² in the public streets, may

95 Wis. 29; 60 Am. St. Rep. 74; 36 L. R. A. 47; 69 N. W. 791; State v. Hilbert, 72 Wis. 184; 39 N. W. 326; State v. Ry., 72 Wis. 612; 1 L. R. A. 771; 40 N. W. 487.

⁵ St. Paul v. Ry., 63 Minn. 330; 34 L. R. A. 184; 63 N. W. 267; 65 N. W. 649; 68 N. W. 458.

⁶ New Orleans v. Telegraph Co., 40 La. Ann. 41; 8 Am. St. Rep. 502; 3 So. 533; Michigan Telegraph Co. v. St. Joseph, 121 Mich. 502; 80 Am. St. Rep. 520; 47 L. R. A. 87; 80 N. W. 383; Hudson Telephone Co. v. Jersey City, 49 N. J. L. 303; 60 Am. Rep. 619; 8 Atl. 123.

⁷ Michigan Telephone Co. v. Charlotte, 93 Fed. 11; Chesapeake, etc., Co. v. Baltimore, 89 Md. 689; 43 Atl. 784; 44 Atl. 1033; Northwestern Telephone Exchange Co. v. Minneapolis, 81 Minn. 140; 53 L. R. A. 175; 83 N. W. 527; 86 N. W. 69; Commonwealth v. Warwick, 185 Pa. St. 623; 40 Atl. 93.

⁸ Southwest Missouri Light Co. v. Joplin, 101 Fed. 23; Levis v. Newton, 75 Fed. 884; Capital City, etc., Co. v. Tallahassee, 42 Fla. 462; 28 So. 810; Rutland, etc., Co. v. Light Co., 65 Vt. 377; 36 Am. St. Rep. 868; 20 L. R. A. 821; 26 Atl. 635; Commercial, etc., Co. v. Tacoma, 17 Wash. 661; 50 Pac. 592; Clarksburg, etc., Co. v. Clarksburg, 47 W. Va. 739; 50 L. R. A. 142; 35 S. E. 994.

⁹ People v. Squire, 145 U. S. 175; affirming People v. Squire. 107 N. Y. 593; 1 Am. St. Rep. 893; 14 N.

E. 820; State v. St. Louis, 145 Mo. 551; 42 L. R. A. 113; 46 S. W. 981.

¹⁰ Los Angeles v. Water Co., 177 U. S. 558; Walla Walla v. Water Co., 172 U. S. 1; St. Tammany Water-Works Co. v. Waterworks Co., 120 U. S. 64; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674; Little Falls, etc., Co. v. Little Falls, 102 Fed. 663; Stein v. Mobile, 49 Ala. 362; 20 Am. Rep. 283; Citizens' Water Co. v. Hydraulic Co., 55 Conn. 1; 10 Atl. 170; Quincy v. Bull, 106 Ill. 337; Warsaw Waterworks Co. v. Warsaw, 161 N. Y. 176; 55 N. E. 486; Skaneateles Waterworks Co. v. Skaneateles, 161 N. Y. 154; 46 L. R. A. 687; 55 N. E. 562; Ashland v. Wheeler, 88 Wis. 607; 60 N. W. 818.

¹¹ Franchise granted by the city council. St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142; Missouri v. Murphy, 170 U. S. 78; (affirming 130 Mo. 10; 31 L. R. A. 798; 31 S. W. 594); Chicago, etc., Co. v. Lake, 130 Ill. 42; 22 N. E. 616; Indianapolis v. Trust Co., 140 Ind. 107; 49 Am. St. Rep. 183; 27 L. R. A. 514; 39 N. E. 433; Toledo v. Gas Co., 5 Ohio C. C. 557; Providence Gas Co. v. Thurber, 2 R. I. 15; 55 Am. Dec. 621. Franchise granted by the state legislature. Louisville Gas Co. v. Gas Co., 115 U. S. 683; New Orleans Gas Co. v. Light Co., 115 U. S. 650.

¹² Gregsten v. Chicago, 145 Ill. 451; 36 Am. St. Rep. 496; 34 N. E. 426.

each upon acceptance by the grantee and the incurring of expense in reliance thereon amount to a contract, the obligation of which is protected by this clause of the Constitution. Thus a city ordinance reducing the rate of fare on a street railway has been held to be an impairment of the obligation of a contract.¹³ If a statute grants an exclusive franchise and such statute is valid, a subsequent act of a municipality interfering with such franchise impairs the obligation of the original contract.¹⁴ Thus the construction of waterworks by a city impairs an exclusive grant of such franchise.¹⁵

Since an invalid contract is not protected by this clause, an unauthorized grant of an exclusive franchise is not protected thereby.¹⁶ The mere grant of a franchise is not presumed to be the grant of an exclusive franchise.¹⁷ Thus a grant of a franchise to operate a waterworks is not a contract preventing the municipality from constructing a competing plant.¹⁸ So a general statute prohibiting a ferry from being established

¹³ (*City of*) *Cleveland v. Ry.*, 194 U. S. 517.

¹⁴ *Louisville Gas Co. v. Gas Co.*, 115 U. S. 683; *New Orleans Gas Co. v. Light Co.*, 115 U. S. 650; *In re Brooklyn*, 143 N. Y. 596; 26 L. R. A. 270; 38 N. E. 983; *Philadelphia, etc., Ry.'s Appeal*, 102 Pa. St. 123; *Potter County Water Co. v. Austin*, 206 Pa. St. 297; 55 Atl. 991; *Providence Gas Co. v. Thurber*, 2 R. I. 15; 55 Am. Dec. 621.

¹⁵ *Walla Walla v. Water Co.*, 172 U. S. 1; *Westerly Waterworks v. Westerly*, 80 Fed. 611; *Bellevue Water Co. v. Bellevue*, 3 Ida. 739; 35 Pac. 693; *White v. Meadville*, 177 Pa. St. 643; 34 L. R. A. 567; 35 Atl. 695; *Memphis v. Water Co.*, 5 Heisk. (Tenn.) 495.

¹⁶ *Hamilton Gas Light Co. v. Hamilton*, 146 U. S. 258; *Norwich Gaslight Co. v. Gas Co.*, 25 Conn. 19; *In re Brooklyn*, 143 N. Y. 596; 26 L. R. A. 270; 38 N. E. 983;

Syracuse Water Co. v. Syracuse, 116 N. Y. 167; 5 L. R. A. 546; 22 N. E. 381; *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515; *North Springs Water Co. v. Tacoma*, 21 Wash. 517; 47 L. R. A. 214; 58 Pac. 773; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739; 50 L. R. A. 142; 35 S. E. 994; *Gas Co. v. Parkersburg*, 30 W. Va. 435; 4 S. E. 650.

¹⁷ *Williams v. Wing*, 177 U. S. 601; *Belmont Bridge v. Wheeling Bridge*, 138 U. S. 287; *Fanning v. Gregoire*, 16 How. 524. "A contract binding the state is only created by clear language and is not to be extended by implication beyond the terms of the statute." *Williams v. Wingo*, 177 U. S. 601, 603.

¹⁸ *North Springs Water Co. v. Tacoma*, 21 Wash. 517; 47 L. R. A. 214; 58 Pac. 773.

within half a mile of one already established is not a contract that no competing ferry at a less distance will ever be permitted.¹⁹

Even if a franchise is non-exclusive, conduct of a municipality interfering with such franchise other than by fair competition impairs the obligation of the original contract. Thus a non-exclusive grant of a franchise to construct waterworks cannot be impaired by subsequently establishing a municipal waterworks to be supported in part by compulsory taxation upon realty near hydrants.²⁰

§1757. Reservation of power over corporate charters and over contracts.

Many states by constitutional provision or by general statute reserve the right to alter and amend certain legislative grants which would otherwise be contracts protected by this constitutional provision. Thus grants of corporate power which would otherwise be contracts,¹ may be taken away by virtue of such provisions. Under such a reservation of power a greater liability for paving may be imposed upon a street railroad;² the personal liability of stockholders may be increased;³ a turn-

¹⁹ *Williams v. Wingo*, 177 U. S. 601.

²⁰ *Warsaw Waterworks Co. v. Warsaw*, 161 N. Y. 176; 55 N. E. 486; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154; 46 L. R. A. 687; 55 N. E. 562; (citing *Farrington v. Tennessee*, 95 U. S. 679; *Asylum v. New Orleans*, 105 U. S. 362; *New Orleans Gas Co. v. Light Co.*, 115 U. S. 650; *Waterworks Co. v. Rivers*, 115 U. S. 674; *Louisville Gas Co. v. Citizens' Gas-light Co.*, 115 U. S. 683; *Bank v. Knoop*, 16 How. 369; (*Dodge v. Woolsey*, 18 How. 331; *New Jersey v. Wilson*, 7 Cranch. 164; *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; 2 L. R. A. 255; 18 N. E. 692).

¹ *People v. Cook*, 148 U. S. 397; *Hamilton, etc., Co. v. Hamilton*, 146 U. S. 258; *Matthews v. Board*, 97 Fed. 400; *Union Pacific Ry. v. Ry.*, 128 Fed. 230; affirming 124 Fed. 409; *Webster v. Seminary*, 78 Md. 193; 28 Atl. 25; *Wagner Free Institute v. Philadelphia*, 132 Pa. St. 612; 19 Am. St. Rep. 613; 19 Atl. 297.

² *Sioux City Street Ry. v. Sioux City*, 138 U. S. 98; (affirming *Sioux City Street R. Co. v. Sioux City*, 78 Ia. 367; 43 N. W. 224;) *Lincoln Street Ry. v. Lincoln*, 61 Neb. 109; 84 N. W. 802; *Storrie v. Ry.*, 92 Tex. 129; 44 L. R. A. 716; 46 S. W. 796.

³ *McGowan v. McDonald*, 111 Cal. 57; 52 Am. St. Rep. 149; 43 Pac.

pike company may be forbidden to keep up its toll-gates within city limits;⁴ statutes granting exemptions from taxation may be repealed or amended,⁵ and so may statutes fixing the rate of taxation on the gross receipts of the railway;⁶ the right of eminent domain may be taken away;⁷ the right of a railroad to fix its rates of transportation may be taken away, if the rates fixed by the state are reasonable;⁸ the power of fixing water rates may be given to a city, though the water company had previously been allowed to exercise it;⁹ a railroad company may be required to abolish grade crossings at its own expense;¹⁰ a corporation may be required to file reports,¹¹ and an assessment insurance company may be changed to an old line company.¹²

Thus where an appeal bond is given and subsequently the jurisdiction of the court is transferred by statute, the appeal bond is not invalidated thereby if the legislature had such power over the jurisdiction of the court when the appeal bond was given.¹³

418; *Bissell v. Heath*, 98 Mich. 472; 57 N. W. 585.

⁴ *Snell v. Chicago*, 133 Ill. 413; 8 L. R. A. 858; 24 N. E. 532.

⁵ *Gulf, etc., Ry. v. Hewes*, 183 U. S. 66; *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636; *Covington v. Kentucky*, 173 U. S. 231; *Louisville Water Co. v. Clark*, 143 U. S. 1; *Northern Bank v. Stone*, 88 Fed. 413; *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636; affirming *Deposit Bank v. Daviess County*, 102 Ky. 174; 44 L. R. A. 825; 39 S. W. 1030; (overruling *Commonwealth v. Bank*, 97 Ky. 590; 31 S. W. 1013;) *State v. Ry.*, 90 Md. 447; 45 Atl. 465.

⁶ *Northern Central Ry. v. Maryland*, 187 U. S. 258. (Even if passed to compromise a dispute as to the exemption of the railway from taxation.)

⁷ *Adirondack Ry. v. New York*, 176 U. S. 335.

⁸ *Minneapolis Eastern Ry. v. Minnesota*, 134 U. S. 467; *Chicago, etc., Ry. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278; 24 L. R. A. 141; 37 N. E. 247.

⁹ *Freeport Water Co. v. Freeport*, 186 Ill. 179; 57 N. E. 862; and see *City of Knoxville v. Water Co.*, 107 Tenn. 647; 61 L. R. A. 888; 64 S. W. 1075. But a power to "regulate" water rates has been held not a power to reduce them below the contract rate. *City of Los Angeles v. Water Co.*, 177 U. S. 558.

¹⁰ *New York, etc., Ry. v. Bristol*, 151 U. S. 556.

¹¹ *People v. Rose*, 207 Ill. 352; 69 N. E. 762.

¹² *Wright v. Ins. Co.*, 193 U. S. 657.

¹³ *Mexican National Ry. Co. v. Mussette*, 86 Tex. 708; 24 L. R. A. 642; 26 S. W. 1075.

The power to alter, amend, or repeal, reserved by the legislature, cannot be so exercised as to divest vested property rights.¹⁴ Thus where a statute imposed a tax on the gross earnings of a corporation in lieu of a tax on property, even a reserved power to amend, alter or repeal cannot give the legislature the right to continue the tax on the gross earnings and at the same time restore the tax on property.¹⁵ So by the exercise of this power, contracts already made by the corporation with other parties cannot be impaired.¹⁶ It has, however, been held that contracts between corporations and their employees may be regulated.¹⁷

§1758. Police power.

The Police Power extends to "the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state."¹ An exact definition, though often attempted, is impossible.² From the nature of the police power it is clear that the legislature can neither contract away its police power nor authorize any agency of the State

¹⁴ Duluth, etc., R. R. v. St. Louis County, 179 U. S. 302; Stearns v. Minnesota, 179 U. S. 223; Smith v. Ry., 64 Fed. 272; Bryan v. Board of Education, 90 Ky. 322; 13 S. W. 276.

¹⁵ Duluth, etc., R. R. v. St. Louis County, 179 U. S. 302; (reversing State v. Duluth, etc., R. R., 77 Minn. 433; *sub nom.* St. Louis County v. R. R., 80 N. W. 626); Stearns v. Minnesota, 179 U. S. 223; reversing State v. Stearns, 72 Minn. 200; 75 N. W. 210.

¹⁶ Greenwood v. Freight Co., 105 U. S. 13; Shields v. Ohio, 95 U. S. 319; Buffalo, etc., Ry. v. Dudley, 14 N. Y. 336.

¹⁷ Leep v. Ry., 58 Ark. 407; 41 Am. St. Rep. 109; 23 L. R. A. 264; 25 S. W. 75.

¹ Ingram v. Colgan, 106 Cal. 113;

46 Am. St. Rep. 221; 28 L. R. A. 187; 38 Pac. 315; 39 Pac. 437.

² Stone v. Mississippi, 101 U. S. 814. "The police power of the state, so far has not received a full and complete definition. It may be said, however, to be the right of the state, or state functionary, to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community which do not encroach on a like power vested in Congress by the Federal Constitution or which do not violate any of the provisions of the organic law. Of this power it may be said that it is known when and where it begins but not when and where it terminates." Champer v. Greencastle, 138 Ind. 339, 351; 46 Am. St. Rep. 390; 24 L. R. A. 768; 35 N. E. 14.

or any public corporation so to do.³ Accordingly, since this clause of the Constitution gives no additional validity to invalid contracts,⁴ contracts which tend to restrict the police power unduly may be abrogated by subsequent legislation. Such legislation is not an impairment of the obligation of contracts.⁵ Thus no contract can prevent a state from subsequently exercising its powers to suppress lotteries,⁶ or to change the place for holding court,⁷ or to impose new requirements for the practice of medicine, if reasonable,⁸ or to impose a license tax on those practising a given profession, such as lawyers,⁹ or to require a safe viaduct over railroad tracks at the crossing of an important street in a large city,¹⁰ or to require a viaduct to be repaired,¹¹ or to require a railway to keep in order all bridges necessary, to enable public roads to cross the railway,¹² or to maintain and repair crossings over its roads,¹³ or to require gates at grade crossings,¹⁴ or to restrain the right of a railroad company to lay tracks across a highway,¹⁵ or to prevent a street railroad from tearing up streets without permission from the aldermen,¹⁶ or to

³ "No one legislature can curtail the power of its successors to make such laws as they deem proper in matters of police." *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657, 668; quoted in *Stone v. Mississippi*, 101 U. S. 814, 888; so *Boyd v. Alabama*, 94 U. S. 645.

⁴ See § 1751.

⁵ *Chicago, etc., Ry. v. Nebraska*, 170 U. S. 57; *Douglass v. Kentucky*, 168 U. S. 488; *Swartz v. Lake County*, 158 Ind. 141; 63 N. E. 31; *State v. Meek*, 112 Ia. 338; 84 Am. St. Rep. 342; 51 L. R. A. 414; 84 N. W. 3; *Baker v. Lexington (Ky.)*, 53 S. W. 16; *State v. Coleman*, 64 O. S. 377; 55 L. R. A. 105; 60 N. E. 568; *Knoxville v. Bird*, 12 Lea (Tenn.) 121; 47 Am. Rep. 326.

⁶ *Douglass v. Kentucky*, 168 U. S. 488; (affirming *Commonwealth v. Douglass*, 100 Ky. 116; 66 Am. St. Rep. 328; 24 S. W. 233); *Stone v. Mississippi*, 101 U. S. 814.

⁷ *Swartz v. Lake County*, 158 Ind. 141; 63 N. E. 31.

⁸ *State v. Coleman*, 64 O. S. 377; 55 L. R. A. 105; 60 N. E. 568.

⁹ *Baker v. Lexington (Ky.)*, 53 S. W. 16.

¹⁰ *Chicago, etc., Ry. v. Nebraska*, 170 U. S. 57.

¹¹ *Chicago, etc., Ry. v. State*, 47 Neb. 549; 53 Am. St. Rep. 557; 41 L. R. A. 481; 66 N. W. 624.

¹² *Illinois Central Ry. v. Copiah County*, 81 Miss. 685; 33 So. 502.

¹³ (*Town of*) *Clarendon v. R. R.*, 75 Vt. 6; 52 Atl. 1057.

¹⁴ (*Inhabitants of*) *Palmyra Township v. Ry.*, 63 N. J. Eq. 799; 52 Atl. 1132; affirming 62 N. J. Eq. 601; 50 Atl. 369.

¹⁵ *Pittsburgh, etc., Ry. v. Chicago*, 159 Ill. 369; 42 N. E. 781.

¹⁶ *City of Westport v. Mulholland*, 159 Mo. 86; 53 L. R. A. 442; 60 S. W. 77.

require a street railway company to clean,¹⁷ or to sprinkle,¹⁸ the space between its tracks, or to require proper fishways in dams,¹⁹ or to require street cars to be so constructed as to give reasonable protection to their employes,²⁰ or to restrain the sale of intoxicating liquors.²¹ Thus the charter of an insurance company does not prevent the state from passing subsequent statutes to require annual statements of the condition of the company to be filed,²² or to make an insurance company liable on policies thereafter issued, for the face of the policy in case of total loss,²³ or to make a railroad company liable for damage caused by fire from its locomotives,²⁴ or to impose liability on the initial carrier where it is alleged that goods were injured while in the custody of a connecting carrier, unless within thirty days after application it traces the damaged freight, and gives written information to the applicant when, where, how and by whom such freight was damaged, and the names of the parties by whom the truth of such facts can be established.²⁵ An insurance company which was entitled when its policies issued, to be subrogated to the claims of the insured against the railroad company for the full value of the property insured, cannot complain because a subsequent statute restricts the liability of the railroad to the difference between the value of the property destroyed and the amount of insurance thereon, though such restriction defeats the right of subrogation.²⁶

¹⁷ (*City of*) *Chicago v. Traction Co.*, 199 Ill. 259; 59 L. R. A. 666; 65 N. E. 243.

¹⁸ *City, etc., Ry. v. Mayor of City of Savannah*, 77 Ga. 731; 4 Am. St. Rep. 106; *State v. R. R.*, 50 La. Ann. 1189; 56 L. R. A. 287; 24 So. 265.

¹⁹ *State v. Meek*, 112 Ia. 338; 84 Am. St. Rep. 342; 51 L. R. A. 414; 84 N. W. 3.

²⁰ *State v. Smith*, 58 Minn. 35; 25 L. R. A. 759; 59 N. W. 545.

²¹ *Kresser v. Lyman*, 74 Fed. 765.

²² *Eagle Ins. Co. v. Ohio*, 153 U. S. 446; *Sandel v. Ins. Co.*, 53 S. C. 241; 31 S. E. 230.

²³ *Word v. Ins. Co.*, 112 Ga. 585; 37 S. E. 897. (The charter of the corporation forbade it to insure property for more than three-fourths of its value.) See § 355.

²⁴ *St. Louis, etc., Ry. v. Mathews*, 165 U. S. 1; (affirming *Matthews v. Ry.*, 121 Mo. 298; 25 L. R. A. 161; 24 S. W. 591); *Lake Erie, etc., Ry. v. Falk*, 61 O. S. 312; 56 N. E. 203.

²⁵ *Central of Georgia Ry. v. Murphy*, 116 Ga. 863; 60 L. R. A. 817; 43 S. E. 265.

²⁶ *Leavitt v. Ry.*, 90 Me. 153; 38 L. R. A. 152; 37 Atl. 886.

Statutes which require previously incorporated corporations of certain kinds, such as railroads,²⁷ or corporations engaged in laying underground electric conductors,²⁸ to contribute to the salary of commissioners having general supervision over such corporations, do not impair the obligation of any contract contained in the charters of such corporations. So a statute requiring payment of wages to certain classes of laborers within fifteen days of pay day, and making blacklisting a misdemeanor does not impair the obligation of such contracts of employment.²⁹

§1759. Impairment of obligation.--Subsequent and prior contracts.

A law in force when a contract is made is part thereof.¹ Whatever objections may be made to the validity of such law, it does not impair the obligation of such contracts.² To be invalid as impairing the obligation of contracts a statute "must be one enacted after the making of the contract, the obligation of which is claimed to be impaired."³ Thus a statute imposing

²⁷ *Charlotte, etc., R. R. v. Gibbs*, 142 U. S. 386.

²⁸ *New York v. Squire*, 145 U. S. 175; affirming *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893; 14 N. E. 820. (The statute in question also required such corporations to file maps showing the location of such conductors).

²⁹ *Commonwealth v. Mining Co.*, — Ky. —; 79 S. W. 287.

¹ *McCullough v. Virginia*, 172 U. S. 102; *Denny v. Bennett*, 128 U. S. 489; *Cravens v. Ins. Co.*, 148 Mo. 583; 71 Am. St. Rep. 628; 53 L. R. A. 305; 50 S. W. 519; *Reed v. Painter*, 129 Mo. 674; 31 S. W. 919.

² *Hooker v. Burr*, 194 U. S. 415; *Blackstone v. Miller*, 188 U. S. 189; *Pinney v. Nelson*, 183 U. S. 144; *McCullough v. Virginia*, 172 U. S. 102; *Galveston, etc., Ry. v. Texas*, 170 U. S. 226; *Brown v. Smart*,

145 U. S. 454; *National Bank v. Augusta, etc., Co.*, 104 Ga. 403; 30 S. E. 888; *Burdick v. People*, 149 Ill. 600, 611; 41 Am. St. Rep. 329; 24 L. R. A. 152; 36 N. E. 948, 952; *Robison v. Harrington*, 61 Ill. App. 543; *Small v. Hammes*, 156 Ind. 556; 60 N. E. 342; *Barrett v. Millikan*, 156 Ind. 510; 83 Am. St. Rep. 220; 60 N. E. 310; *Frazee v. Dupre*, 51 La. Ann. 411; 25 So. 260; *Wellman v. Ry.*, 83 Mich. 592; 47 N. W. 489; *Perkins v. Stewart*, 75 Minn. 21; 77 N. W. 434; *St. Charles v. Hackman*, 133 Mo. 634; 34 S. W. 878; *Ellerbe v. Benefit Association*, 114 Mo. 501; 21 S. W. 843; *Williams v. Donough*, 65 O. S. 499; 56 L. R. A. 766; 63 N. E. 84; *McMaster v. Normal*, 162 Pa. St. 260; 29 Atl. 734.

³ *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391; quoted in *Pinney v. Nelson*, 183 U. S. 144, 147.

a personal liability upon the stockholders of foreign corporations doing business within the state does not impair the obligation of the contract entered into between the stockholders of a foreign corporation subsequently incorporated for the purpose of doing business in that state.⁴ So a law providing that an assignment for the benefit of creditors may be made whenever property is seized on execution or attachment and that such assignment shall discharge the lien of such levy or attachment, is valid as applying to debts subsequently incurred.⁵ So a statute giving a lien on crops to laborers and making it superior to an earlier mortgage is valid as to mortgages executed after such statute.⁶ A law passed after a contract is made purporting to affect it, may be invalid as impairing the obligation of such contract.⁷ However breach of a contract entered into by a state may give a right of action, subject to the consent of such state, but the statute or resolution whereby such breach is ordered is not a law impairing the obligation of its contract. Thus a joint resolution of the legislature requiring the treasurer to write off past due bonds is not a law impairing the obligation of a contract.⁸

§1760. Relative priority of statute and contract.

In this sense the contract comes into existence at the moment that it becomes enforceable between the parties, even though further acts are to be done in performance thereof.¹ Thus when

⁴ Pinney v. Nelson, 183 U. S. 144.

⁵ *In re Pauley's Estate*, 149 Pa. St. 196; 24 Atl. 114.

⁶ *Sitton v. Dubois*, 14 Wash. 624; 45 Pac. 303.

⁷ *Louisiana v. New Orleans*, 102 U. S. 203; *Gunn v. Barry*, 82 U. S. 610; *Ernst v. Hollis*, 89 Ala. 638; 8 So. 122; *Stephens v. E. R. Co.*, 109 Cal. 86; 50 Am. St. Rep. 17; 29 L. R. A. 751; 41 Pac. 783; *State v. Bradshaw*, 39 Fla. 137; 22 So. 296; *McMurray v. Sidwell*, 155 Ind. 560; 50 Am. St. Rep. 255; 58 N. E. 722; *Cary Library v. Bliss*, 151 Mo. 38, 264; 7 L. R. A. 765; 25 N. E.

92; *Hamilton v. State (Miss.)*, 8 So. 761; s. c., 67 Miss. 217; 7 So. 282; *State v. Kearney*, 49 Neb. 325; 68 N. W. 533; *American, etc., Association v. Rainbolt*, 48 Neb. 434; 67 N. W. 493; *State v. McPeak*, 31 Neb. 139; 47 N. W. 691; *Hughes v. Cuming*, 165 N. Y. 91; 58 N. E. 794; *Flewellen v. Proetzel*, 80 Tex. 191; 15 S. W. 1043.

⁸ *Smith v. Jennings*, 67 S. C. 324; 45 S. E. 821.

¹ *Bedford v. Loan Association*, 181 U. S. 227; *Central Trust Co. v. Ry.*, 70 Fed. 282.

a certificate of stock is issued to a member of a loan association incorporated in a foreign state, and his application for a loan is approved, a contract exists which cannot be impaired by subsequent legislation restricting the right of such corporation to do business in such state, even though the loan was not made until after the statute was passed.²

If a debt was contracted before a statute was passed and a note given therefor after the statute was passed, the date of contracting the debt determines the validity of the statute.³ It will not be presumed, however, that a given contract was entered into before the statute in question was passed; but that fact must be affirmatively shown.⁴

On the other hand, a transaction which has not yet created contract rights may be affected by a statute passed during such transaction.⁵ Thus a statute withdrawing public land from sale does not impair the rights of prospective purchasers who have not complied with the law so far as to secure their rights.⁶ If they have complied with the law so far as to acquire rights in the public lands a subsequent change of statute cannot divest such rights.⁷ The date of the law, in determining the application of this principle, is the date at which the law is passed and not that at which it is to go into effect, if it is to go into effect at a period subsequent to its passage.⁸ Thus a statute made contracts of a foreign corpora-

² Bedford v. Loan Association, 181 U. S. 227.

³ Wilson v. Brochon, 95 Fed. 82.

⁴ Blair v. Ostrander, 109 Ia. 204; 77 Am. St. Rep. 532; 47 L. R. A. 469; 80 N. W. 330; Williams v. Donough, 65 O. S. 499; 56 L. R. A. 766; 63 N. E. 84.

⁵ Campbell v. Wade, 132 U. S. 34.

⁶ Campbell v. Wade, 132 U. S. 34.

⁷ American Association v. Innis, 109 Ky. 595; 60 S. W. 388; State v. Bridges, 22 Wash. 64; 79 Am. St. Rep. 914; 60 Pac. 60; (citing Lytle v. Arkansas, 9 How. 314;

Stark v. Starrs, 6 Wall. 402; The Yosemite Valley Case; (*sub. nom.* Hutchings v. Low), 15 Wall. 77; Barney v. Dolph, 97 U. S. 652; Wirth v. Branson, 98 U. S. 118; distinguishing Allen v. Forrest, 8 Wash. 700; 24 L. R. A. 606; 36 Pac. 971; Frisbie v. Whitney, 9 Wall. 187; The Yosemite Valley Case (*sub. nom.* Hutchings v. Low), 15 Wall. 77; Campbell v. Wade, 132 U. S. 34).

⁸ Diamond Glue Co. v. Glue Co., 187 U. S. 611; Wrightman v. Boone County, 88 Fed. 435; same case, 82 Fed. 412; Hedger v. Rennaker, 3

tion which did not file its charter with the secretary of state void on the corporation's behalf but valid against it. This statute was to go into effect at a future time. It was held that a contract entered into by such corporation in the interim was affected by such statute.⁹ So a deed of trust executed after the passage of a statute providing that certain mechanics' liens created after mortgages may have priority over them, but before it goes into effect, is governed by the provisions of such statute.¹⁰

The greater number of the cases cited are on the point that in determining what is a reasonable time for bringing suit in case the statute of limitations is shortened, the time given is to be counted from the date of the passage of the act.¹¹ Thus where a statute of limitations was to take effect six months after its passage, it was not invalid as impairing the obligation of contracts because causes of action were barred thereby as soon as it took effect, if a reasonable time was given after the passage of the act.¹² A statute in force when the contract was made was

Met. (Ky.) 255; *Smith v. Morrison*, 22 Pick. (Mass.) 430; *Hill v. Townley*, 45 Minn. 167; 47 N. W. 653; *Duncan v. Cobb*, 32 Minn. 460; 21 N. W. 714; *O'Brien v. Gaslin*, 20 Neb. 347; 30 N. W. 274; (following *Harbach v. Miller*, 4 Neb. 31); *Osborne v. Lindstrom*, 9 N. D. 1; 81 Am. St. Rep. 516; 46 L. R. A. 715; 81 N. W. 72; *Merchants' National Bank v. Braithwaite*, 7 N. D. 358; 66 Am. St. Rep. 653; 75 N. W. 244; *Korn v. Browne*, 64 Pa. St. 55; *Virginia Development Co. v. Iron Co.*, 90 Va. 126; 44 Am. St. Rep. 893; 17 S. E. 806; *Eaton v. Supervisors*, 40 Wis. 668. *Contra*, that it is the taking effect of the statute and not the date of its passage. *Ludwig v. Stewart*, 32 Mich. 27; *Price v. Hopkins*, 13 Mich. 318; *Gilbert v. Ackerman*, 159 N. Y. 118; 45 L. R. A. 118; 53 N. E. 753.

⁹ *Diamond Glue Co. v. Glue Co.*, 187 U. S. 611.

¹⁰ *Virginia Development Co. v.*

Iron Co., 90 Va. 126; 44 Am. St. Rep. 893; 17 S. E. 806.

¹¹ *Wrightman v. Boone County*, 88 Fed. 435; same case, 82 Fed. 412; *Hedger v. Rennaker*, 3 Met. (Ky.) 255; *Smith v. Morrison*, 22 Pick. (Mass.) 430; *O'Brien v. Gaslin*, 20 Neb. 347; (following 30 N. W. 274; *Harbach v. Miller*, 4 Neb. 31); *Osborne v. Lindstrom*, 9 N. D. 1; 81 Am. St. Rep. 516; 46 L. R. A. 715; 81 N. W. 72. "The plain purpose of this provision was to give the holders of judgments rendered ten years or more before the passage of the act a reasonable time in which to revive their judgments before the act took effect." *Wrightman v. Boone County*, 88 Fed. 435, 436. *Contra*, *Ludwig v. Stewart*, 32 Mich. 27; *Gilbert v. Ackerman*, 159 N. Y. 118; 45 L. R. A. 118; 53 N. E. 753.

¹² *Hill v. Townley*, 45 Minn. 167; 47 N. W. 653. *Contra*, *Gilbert v. Ackerman*, 159 N. Y. 118; 45 L. R. A. 118; 53 N. E. 753.

subsequently repealed and then re-enacted. Its re-enactment was held not to impair the obligation of the contract, no modification of it having been made while such repeal is in force.¹³ If a corporation whose charter is not subject to alteration by the state accepts the benefits of subsequent legislation, it becomes subject to all the provisions thereof.¹⁴ The contractual charter rights of a lessee of a street railway line date from the charter of the lessee and not from that of the lessor.¹⁵

§1761. Illustrations of impairment of obligation of contracts.

As is natural, the earlier cases illustrate more frequently than the later ones, undisguised attempts to impair the obligation of contracts, while the later cases are more likely to illustrate attempts of the legislature to impair the obligation of contracts by statutes not avowedly passed for that purpose. Whether the intention is open or concealed, the statute is invalid if its effect is to impair the obligation of contracts. Contracts valid when made cannot be made invalid by a subsequent statute declaring that they are unenforceable.¹ Thus bonds, valid when issued,² or contracts between a railroad company and its employes whereby the latter waive their rights to damages for personal injuries, if valid when made,³ or contracts for removing logs belonging to one party which have

¹³ *Knights' Templars', etc., Indemnity Co. v. Jarman*, 187 U. S. 197. (The statute provided that suicide should be no defense to a policy of life insurance. The policy contained a provision that the insurance company should not be liable in case of suicide, which provision was void by reason of such statute.)

¹⁴ *Yates v. People*, 207 Ill. 316; 69 N. E. 775.

¹⁵ *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484; 59 L. R. A. 631; 65 N. E. 451. (The lessor's charge gave it the right to charge a fixed rate of fare not subject to in-

voluntary reduction. The lessee was subject to the right of the city to fix the rate of fare. After the lease the city was allowed to change the rate of fare, below that allowed to the lessor.)

¹ *Louisiana v. Taylor*, 105 U. S. 454; *White v. Hart*, 13 Wall. (U. S.) 646; *Bates v. Gregory* (Cal.), 22 Pac. 683; *Bates v. Gregory*, 89 Cal. 387; 26 Pac. 891.

² *Red Rock v. Henry*, 106 U. S. Pac. 683; *Bates v. Gregory*, 89 Cal. 387; 26 Pac. 891.

³ *Shaver v. Pennsylvania Co.*, 71 Fed. 931.

floated upon the lands of the other party in high water, without paying damages,⁴ or a contract by a city for a heating plant,⁵ cannot be made invalid by subsequent statute. So if one has obtained a permit from proper municipal authority to erect a frame building with fire limits, and incurs liabilities on contracts for the erection thereof, the city cannot thereafter rescind such permit.⁶ So an act providing that in case of a division of a religious society a majority of each congregation shall determine to which branch the congregation shall belong, which determination is to be conclusive as to the rights in the property held in trust for such congregation, is invalid.⁷ So an act requiring pre-existing warrants to be registered in a certain time, making them invalid if not so registered, is unconstitutional.⁸

If a public official has, without any fault of his own, lost public money for which he is personally liable, a release of such liability is held valid in some states,⁹ on the theory that it is not a gift or a purely gratuitous release, but is a "release of a claim which though legally due, the legislature found that it would be unjust and oppressive to collect," and is supported by the consideration of "the moral obligation to release it."¹⁰ The chief point of interest in this holding is that it revives the by-gone theory of a moral obligation. Other courts hold that such release impairs the obligation of the contract between the public official and the public corporation.¹¹ In this connection and in support of the last proposition, the analogous case *In re Greene*¹² might be referred to. In that case, a county

⁴ *Bradley v. Boom Co.*, 82 Mich. 9; 46 N. W. 24.

⁵ (*City of*) *Ludlow v. Ventilating Co.*, — Ky. —; 76 S. W. 377.

⁶ *Buffalo v. Chadeayne*, 134 N. Y. 163; 31 N. E. 443.

⁷ *Finley v. Brent*, 87 Va. 103; 11 L. R. A. 214; 12 S. E. 228.

⁸ *Robinson v. Magee*, 9 Cal. 81; 70 Am. Dec. 638.

⁹ *Pearson v. State*, 56 Ark. 148; 35 Am. St. Rep. 91; 19 S. W. 499;

Board of Education v. McLandsborough, 36 O. S. 227; 38 Am. Rep. 582; *Mount v. State*, 90 Ind. 29; 46 Am. Rep. 192.

¹⁰ *Pearson v. State*, 56 Ark. 148, 35 Am. St. Rep. 91; 19 S. W. 499.

¹¹ *Johnson v. Randolph County*, 140 Ind. 152; 39 N. E. 311; *McClelland v. State*, 138 Ind. 321; 37 N. E. 1089.

¹² 166 N. Y. 485; 60 N. E. 183.

treasurer who was also a bank cashier overdrew his account at the bank to pay his obligations to the county. Subsequently the bank sued the county to recover this money. Judgment was rendered in favor of the county. The bank then applied to the legislature and a special act was passed requiring the county to pay such debt. This act was held invalid.

A new defense, not permitted by law when the contract was entered into, cannot be created by subsequent statute. Thus a state bankrupt act which provides for giving a discharge from liabilities to such debtors as comply therewith is invalid as to past debts.¹³ A state insolvent act may be modified as to pre-existing debts so as to withdraw the protection of the discharge granted after the act was passed from certain classes of debts, as where by statute the discharge of the principal debtor did not release another liable for the same debt, as guarantor, surety or otherwise.¹⁴ So a loan made by a foreign corporation before a statute requiring the charter to be filed in that state is not affected by such subsequent act.¹⁵

§1762. Partial impairment.—Change in interest.

A statute which leaves part of the contract in force but modifies certain of its terms or changes its legal effect is invalid.¹ Thus the legislature cannot restrict the assignability or negotiability of prior contracts,² or require the same notice to be given to blank indorsers out of the chain of title as to regular

¹³ *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Smith v. Mead*, 3 Conn. 253; 8 Am. Dec. 183; *Union Bank v. Rugg*, 78 Minn. 256; 80 N. W. 1121; *Roosevelt v. Cebra*, 17 Johns. (N. Y.) 108; *Elton v. O'Connor*, 6 N. D. 1; 33 L. R. A. 524; 68 N. W. 84; *Conway v. Seamons*, 55 Vt. 8; 45 Am. Rep. 579.

¹⁴ *Willis v. Mabon*, 48 Minn. 140; 31 Am. St. Rep. 626; 16 L. R. A. 281; 50 N. W. 1110.

¹⁵ *Pioneer, etc., Co. v. Cannon*, 96 Tenn. 599; 54 Am. St. Rep. 858;

33 L. R. A. 112; 36 S. W. 386; and see on the same point *Root v. Sweeney*, 12 S. D. 43; 80 N. W. 149.

¹ *McGahey v. Virginia*, 135 U. S. 662; *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624; 11 L. R. A. 370; 26 N. E. 778; *Louisville School Board v. Bank*, 86 Ky. 150; 5 S. W. 739; *Cook v. Googins*, 126 Mass. 410; *O'Brien v. Krenz*, 36 Minn. 136; 30 N. W. 458; *State v. McPeak*, 31 Neb. 139; 47 N. W. 691.

² *McGahey v. Virginia*, 135 U. S. 662.

indorsers, to fix liability,³ or dispense with certain acts, necessary when a contract was made to fix the liability of an indorser,⁴ or change the place of performance,⁵ nor change the time of performance, as by abolishing days of grace.⁶ A statute changing the rate of interest for pre-existing contracts impairs their obligation,⁷ whether such rate is expressly fixed by contract,⁸ or the contract specifically provides for interest but does not fix the rate, thereby impliedly adopting the legal rate,⁹ or even, by some authorities if the contract is simply for the payment of money, without any provision for interest.¹⁰ Thus the interest on state¹¹ or county warrants¹² cannot be changed by statute. If a state debt bears no interest when it is incurred the state cannot be compelled by subsequent statute to pay interest thereon.¹³ On the other hand, where a statute provided that warrants should bear interest from the date of presentation, the interest becomes a part of the obligation only after presentation; and a statute reducing the rate of interest is valid as to warrants issued before such statute was passed but not presented till after.¹⁴ So in New York a statute

³ Cook v. Googins, 126 Mass. 410.

⁴ Farmers' Bank v. Gunnell, 26 Gratt. (Va.) 131.

⁵ Carr v. State, 127 Ind. 204; 22 Am. St. Rep. 624; 11 L. R. A. 370; 26 N. E. 778.

⁶ Wood v. Rosendale, 18 Ohio C. C. 247.

⁷ Koshkonong v. Burton, 104 U. S. 668; First National Bank v. Arthur, 10 Colo. App. 283; 50 Pac. 738; Butler v. Rockwell, 17 Colo. 290; 17 L. R. A. 611; 29 Pac. 458; Seymour v. Ins. Co., 44 Conn. 300; 26 Am. Rep. 469; State v. Barrett, 25 Mont. 112; 63 Pac. 1030; Seton v. Hoyt, 34 Or. 266; 75 Am. St. Rep. 641; 43 L. R. A. 634; 55 Pac. 967; Scranton v. Gas Co., 102 Pa. St. 382; Union Savings Bank and Trust Co. v. Gelbach, 8 Wash. 497; 24 L. R. A. 359; 36 Pac. 467; Williams v. Shoudy, 12 Wash. 362; 41

Pac. 169; State v. Bowen, 11 Wash. 432; 39 Pac. 648; Murdock v. Ins. Co., 33 W. Va. 407; 7 L. R. A. 572; 10 S. E. 777.

⁸ Sims v. Squires, 80 Ind. 42; Kassing v. Ordway, 100 Ia. 611; 69 N. W. 1013; Richardson v. Campbell, 27 Neb. 644; 11 L. R. A. 189; 43 N. W. 405; Guild v. Bank, 4 S. D. 566; 57 N. W. 499.

⁹ Wyckoff v. Wyckoff, 44 N. J. Eq. 56; 13 Atl. 662.

¹⁰ Lee v. Davis, 1 A. K. Mar. (Ky.) 397; 10 Am. Dec. 746.

¹¹ State v. Barrett, 25 Mont. 112; 63 Pac. 1030.

¹² Seton v. Hoyt, 34 Or. 266; 75 Am. St. Rep. 641; 43 L. R. A. 634; 55 Pac. 967.

¹³ Molineux v. State, 109 Cal. 378; 50 Am. St. Rep. 49; 42 Pac. 34.

¹⁴ State v. Young, 22 Wash. 547; 61 Pac. 725.

reducing the rate of interest from seven per cent to six, was held to apply to interest accruing after the passage of the act, but not to that accruing before, where the contract on which the money was due did not specifically provide for interest as a claim on book-account,¹⁵ or a claim for an unpaid dividend.¹⁶

§1763. Exemption from taxation.

If no contract exempting property from taxation exists, a subsequent statute increasing the burden of taxation or assessment is valid.¹ Thus an assessment may be imposed in addition to the former taxation. A city ordinance requiring a street railway company to pave between the rails is not such a contract to impose no further assessment that the state legislature cannot further require the railway company to pave one foot outside its rails.² So the imposition of an annual tax upon a foreign corporation for the privilege of doing business in the state, is not a contract exempting its property within that state from taxation.³ In the absence of an agreement between the state and the property owner for exemption from taxation, supported by a sufficient consideration, actual exemption from taxation,⁴ or assessments,⁵ does not constitute a valid

¹⁵ *Reese v. Rutherford*, 90 N. Y. 644.

¹⁶ *Sanders v. Ry.*, 94 N. Y. 641.

¹ *Gulf, etc., Ry. v. Hewes*, 183 U. S. 66; *Wells v. Savannah*, 181 U. S. 531; 32 S. E. 669 (affirming 107 Ga. 1); *Sioux City Street Ry. v. Sioux City*, 138 U. S. 98 (affirming 78 Ia. 367; 43 N. W. 224); *Commonwealth v. Ry.*, 129 Pa. St. 463; 15 Am. St. Rep. 724; 18 Atl. 412.

² *Sioux City Street Ry. v. Sioux City*, 138 U. S. 98 (affirming *Sioux City Street Ry. v. Sioux City*, 78 Ia. 367; 43 N. W. 224).

³ *Home Ins. Co. v. Augusta*, 93 U. S. 116 (affirming 50 Ga. 530); *Commonwealth v. Ry.*, 129 Pa. St. 463; 15 Am. St. Rep. 724; 18 Atl. 412.

⁴ *Wisconsin, etc., Ry. v. Powers*, 191 U. S. 379; *Gulf, etc., Ry. v. Hewes*, 183 U. S. 66; *Wells v. Savannah*, 181 U. S. 531 (affirming 107 Ga. 1); 32 S. E. 669; *Covington v. Kentucky*, 173 U. S. 231; *Grand Lodge, etc., v. New Orleans*, 166 U. S. 143 (affirming *Grand Lodge v. New Orleans*, 44 La. Ann. 659; 11 So. 148); *Tucker v. Ferguson*, 22 Wall. 527; *Newport v. Temple Association*, 103 Ky. 592; 45 S. W. 881; 46 S. W. 697; *Manistee, etc., Ry. v. Commissioner of Railroads*, 118 Mich. 349; 76 N. W. 633.

⁵ *Miller v. Hageman*, 114 Ia. 195; 86 N. W. 281; *Bradley v. McAtee*, 7 Bush. (Ky.) 667; 3 Am. Rep. 309; *State v. Mayor*, 35 N. J. L.

obligation to continue such exemption.⁶ Thus a license tax may be imposed upon an established business.⁷ Thus statutes exempting railroads from taxation if built and operated in certain territory,⁸ or a charter exempting a railroad from taxation for twenty years,⁹ or exempting realty from general road taxes if assessed for local street improvements in an amount equal to or greater than the general tax,¹⁰ or a provision in a municipal charter that any given tract of realty should be assessed only once for constructing a street,¹¹ none of them constitute contracts. If the legislature is unrestrained by constitutional limitations, it may make a valid contract for an exemption from taxation, the obligation of which cannot be impaired by subsequent legislation.¹² Thus a contract by statute

168; 37 N. J. L. 415; 18 Am. Rep. 729; Ladd v. Portland, 32 Or. 271; 67 Am. St. Rep. 526; 51 Pac. 654.

⁶ "The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters the contract has not been proved and the exemption does not exist." Wells v. Savannah, 181 U. S. 531, 539; citing Tucker v. Ferguson, 22 Wall. (U. S.) 527; Bank of Commerce v. Tennessee, 161 U. S. 134.

⁷ Munn v. Illinois, 94 U. S. 113; Cuthbert v. Commonwealth, 85 Va. 899; 9 S. E. 16.

⁸ Wisconsin, etc., Ry. v. Powers, 191 U. S. 379; Manistee, etc., Ry. v. Commissioner of Railroads, 118 Mich. 349; 76 N. W. 633.

⁹ Gulf, etc., Ry. v. Hewes, 183 U. S. 66.

¹⁰ Miller v. Hagemann, 114 Ia. 195; 86 N. W. 281.

¹¹ Bradley v. McAtee, 7 Bush.

(Ky.) 667; 3 Am. Rep. 309; State v. Mayer, 35 N. J. L. 168; 37 N. J. L. 415; 18 Am. Rep. 729; Ladd v. Portland, 32 Or. 271; 67 Am. St. Rep. 526; 61 Pac. 654.

¹² Hartman v. Greenhow, 102 U. S. 672; Hoge v. Ry., 99 U. S. 348; Keith v. Clark, 97 U. S. 45; Erie Ry. v. Pennsylvania, 21 Wall. (U. S.) 492; Furman v. Nichol, 8 Wall. (U. S.) 44; Woodruff v. Trapnall, 10 How. (U. S.) 190; State v. Bible Society, 134 Ala. 632; 32 So. 1011; Seymour v. Hartford, 21 Conn. 481; Commonwealth v. Ry., 95 Ky. 60; 23 S. W. 868; Newark v. Cemetery Co., 58 N. J. L. 168; 33 Atl. 396; affirming Cemetery Co. v. Newark, 52 N. J. L. 539; 20 Atl. 832; Armstrong v. Athens County, 10 Ohio 235; Hogg v. Mackay, 23 Or. 339; 37 Am. St. Rep. 682; 19 L. R. A. 77; 31 Pac. 779; Commonwealth v. Ry., 164 Pa. St. 252; 30 Atl. 145; State v. Bank, 95 Tenn. 221; 31 S. W. 993; Whiting v. West Point, 88 Va. 905; 29 Am. St. Rep. 750; 75 L. R. A. 860; 14 S. E. 698.

to exempt the property of a railroad company,¹³ or other corporation,¹⁴ or stock in a corporation,¹⁵ or certain occupations,¹⁶ cannot be impaired by subsequent legislation.

A succession tax is held not to be a direct tax upon property bequeathed or passing by intestate succession, but to be a charge upon the right to take such property. Accordingly, such tax may be laid upon property specifically exempted by statute from taxation.¹⁷

§1764. Impairment of obligation of contract by limiting power of taxation.

The legislature cannot, while leaving a municipality in existence, deprive it of the power to levy taxes sufficient to pay its pre-existing debts if such power was possessed when such debts were incurred.¹ A change of name or of boundaries cannot justify the legislature in depriving a municipality of the power to lay taxes so as to pay its pre-existing debts,² nor does the attempt to destroy the municipality and to sub-

¹³ *Barnes v. Kornegay*, 62 Fed. 671; *Commonwealth v. Ry.*, 95 Ky. 60; 23 S. W. 868; *Commonwealth v. Ry.*, 164 Pa. St. 252; 30 Atl. 145.

¹⁴ *St. Vincent's College v. Schaefer*, 104 Mo. 261; 16 S. W. 395.

¹⁵ *Bank of Commerce v. Tennessee*, 161 U. S. 134; modified on rehearing so as to uphold the tax on stock issued as increased stock after the tax law took effect, 163 U. S. 416; *Mobile & Ohio R. R. v. Tennessee*, 153 U. S. 486.

¹⁶ *New Orleans v. Telegraph Co.*, 40 La. Ann. 41; 8 Am. St. Rep. 502; 8 So. 533; *New York v. Ry.*, 32 N. Y. 261.

¹⁷ *Orr v. Gilman*, 183 U. S. 278 (citing *Carpenter v. Pennsylvania*, 17 How. (U. S.) 456).

¹ *Wolff v. City of New Orleans*, 107 U. S. 358; *Ralls County Court v. United States*, 105 U. S. 733; *Louisiana v. Police Jury*, 111 U. S.

716; *Mobile v. Watson*, 116 U. S. 289; *Seibert v. Lewis*, 122 U. S. 284; *Fisk v. Police Jury*, 116 U. S. 131; *Von Hoffman v. City of Quincy*, 4 Wall. (U. S.) 535; *(City of) Galena v. Amy*, 5 Wall. (U. S.) 705; *Butz v. City of Muscatine*, 8 Wall. (U. S.) 575; *Padgett v. Post*, 106 Fed. 600; 45 C. C. A. 488; *Hicks v. Cleveland*, 106 Fed. 459; 45 C. C. A. 429; *In re Copenhaver*, 54 Fed. 660; *United States v. Knox County*, 51 Fed. 880; *Hammond v. Place*, 116 Mich. 628; 72 Am. St. Rep. 543; 74 N. W. 1002; *Broadfoot v. Fayetteville*, 124 N. C. 478; 70 Am. St. Rep. 610; 32 S. E. 804; *Memphis v. Bethel* (Tenn.), 17 S. W. 191; *Townsend, etc., Co. v. Hill*, 24 Wash. 469; 64 Pac. 778; *Eidenmiller v. Tacoma*, 14 Wash. 376; 44 Pac. 877.

² *Bates v. Gregory*, 89 Cal. 387; 26 Pac. 891.

stitute therefor another, covering substantially the same territory.³ So if the new municipality is liable for the debts of its predecessor, a statute providing that it shall be liable only if the tax-paying voters shall vote to assume such liability is invalid.⁴ A statute which reduces the area of a municipality but leaves the municipality able to pay all pre-existing debts does not impair the obligation of contracts.⁵ However, the legislature may destroy a municipal corporation and thus make it impossible to enforce its obligations.⁶

§1765. Change of remedy.

A remedy given by the law is no part of the obligation of a contract.¹ Neither party has such a vested right therein that the legislature cannot alter it.² On the other hand, the existence of some sufficient remedy is essential to the obligation of a contract. A change made by a written law, affecting a remedy in existence when the contract right arose which destroys or modifies the remedy, and does not supply an alternative remedy equally adequate and efficacious, or does not leave the remedy thus modified as efficacious as before, is

³ *Mobile v. Watson*, 116 U. S. 289; *Broadfoot v. Fayetteville*, 124 N. C. 478; 70 Am. St. Rep. 610; 32 S. E. 804.

⁴ *Shapleigh v. San Angelo*, 167 U. S. 646.

⁵ *Kansas Town Co. v. McLean*, 7 Kan. App. 101; 53 Pac. 76; *Metcalf v. State*, 49 O. S. 586; 31 N. E. 1076. So of a statute changing a school district so as to include some territory without the old district, and excluding some of the territory within the old district, and making the new district liable for the debts of its predecessor. *Attorney General v. Lowrey*, 131 Mich. 639; 92 N. W. 289.

⁶ *Meriwether v. Garrett*, 102 U. S. 472; *Luehrman v. Taxing District*, 2 Lea (Tenn.) 425.

¹ *Brown v. Challis*, 23 Colo. 145; 46 Pac. 679; *Templeton v. Horne*, 82 Ill. 491; *Terre Haute, etc., Ry. v. State*, 159 Ind. 438; 65 N. E. 401; *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559.

² *Baltzer v. North Carolina*, 161 U. S. 240; *Hill v. Ins. Co.*, 134 U. S. 515; *Kerchoff-Cuzner, etc., Co. v. Olmstead*, 85 Cal. 80; 24 Pac. 648; *Groesbeck v. Barger*, 1 Kan. App. 61; 41 Pac. 204; *Somerset Ry. Co. v. Pierce*, 88 Me. 86; 33 Atl. 772; *Brown v. Buck*, *Kalamazoo Circuit Judge*, 75 Mich. 274; 13 Am. St. Rep. 438; 5 L. R. A. 226; 42 N. W. 827; *Sims v. Steadman*, 62 S. C. 300; 40 S. E. 677; *Kirkman v. Bird*, 22 Utah 100; 83 Am. St. Rep. 774; 58 L. R. A. 669; 61 Pac. 338.

an impairment of the obligation of contracts.³ A change of remedy such "as substantially to impair and lessen the value of the contract" is forbidden by the Constitution of the United States.⁴ Thus a statute limiting the amount of recovery on a debt secured by mortgage to the proceeds of the mortgaged property is invalid.⁵ So a statute forbidding sale under an inferior lien where realty has once been sold under a superior lien and the holder of the legal title has the right to redeem in fifteen months impairs the obligation of the contract of a prior lien.⁶ So a statute which provides that no action can be brought on pre-existing notes unless the plaintiff files an affidavit that he has paid taxes thereon is invalid.⁷ A statute which modifies a remedy so that the original right is scarcely worth pursuing clearly impairs the obligation of contracts.⁸ The practical application of these distinctions to different statutes which modify remedies has caused the courts considerable difficulty.

The rule that a change of remedy is not an impairment of the obligation of pre-existing contracts is subject to one qualification. If the parties to a contract have specifically contracted for certain remedies and such contract is legal and valid, a subsequent change of statute cannot take away the right to the remedy thus contracted for.⁹ Impairment of the obligation of contracts "always happens where the parties make legal remedies a subject of their contract and subsequent legislation conflicts with what they have expressed in their agree-

³ *McGahey v. Virginia*, 135 U. S. 662; *Memphis v. United States*, 97 U. S. 293; *Lake Erie, etc., Co. v. Griffin (Ind.)*, 53 N. E. 1042; *Beverly v. Barnitz*, 55 Kan. 466; 49 Am. St. Rep. 257; 31 L. R. A. 74; 42 Pac. 725.

⁴ *Edwards v. Kearzey*, 96 U. S. 595.

⁵ *Dennis v. Moses*, 18 Wash. 537; 40 L. R. A. 302; 52 Pac. 333.

⁶ *Shrigley v. Black*, 66 Kan. 213; 71 Pac. 301.

⁷ *Walker v. Whitehead*, 16 Wall. (U. S.) 314.

⁸ *Teralta, etc., Co. v. Shaffer*, 116 Cal. 518; 58 Am. St. Rep. 194; 48 Pac. 613.

⁹ *Lake Erie, etc., Ry. v. Griffin*, — Ind. —; 53 N. E. 1042; *Pool v. Young*, 7 T. B. Mon. (Ky.) 587; *O'Brien v. Krenz*, 36 Minn. 136; 30 N. W. 458; *Breitenbach v. Bush*, 44 Pa. St. 313; 84 Am. Dec. 442; *Thompson v. Cobb*, 95 Tex. 140; 65 S. W. 1090.

ment."¹⁰ Thus where a trust deed contained a clause providing for a sale in default of the obligation which it secured, a subsequent statute which provides for a different notice and requires the sale to be made in the county in which such real estate is situated, cannot restrict such power of sale.¹¹ So if a power of sale is given which does not require a notice, a subsequent statute providing for a notice cannot affect such power.¹² So if a deed of trust provides for a sale "at any time," a subsequent statute providing that such sales must be made on a certain day of the month is invalid as applying to such prior deeds.¹³ So a mortgage in which the mortgagor covenants to pay all assessments on all interests in the land mortgaged cannot be affected by a subsequent statute providing for separate taxation of the different interests in mortgaged realty.¹⁴ A statute which either lengthens,¹⁵ or shortens,¹⁶ the time fixed by an insurance policy for bringing an action on such policy, is invalid. If the so-called prior remedy gives no means of enforcing the contract, abolishing it without any substitute does not impair the obligation of contract. Thus a clause in the Constitution giving the Supreme Court jurisdiction to hear claims against the state and, if it finds in favor of such claim to recommend to the state legislature that it should make an appropriation therefor, does not provide a remedy within the meaning of this rule; and a subsequent constitutional amendment abolishing this procedure and providing that the legislature shall not authorize payment or taxation for the payment of certain claims, including the one in

¹⁰ *Billmeyer v. Evans*, 40 Pa. St. 324, 327; quoted in *International, etc., Association v. Hardy*, 86 Tex. 610; 40 Am. St. Rep. 870; 24 L. R. A. 284; 26 S. W. 497.

¹¹ *International, etc., Association v. Hardy*, 86 Tex. 610; 40 Am. St. Rep. 870; 24 L. R. A. 284; 26 S. W. 497.

¹² *Smith v. Green*, 41 Fed. 455.

¹³ *Thompson v. Cobb*, 95 Tex. 140; 65 S. W. 1090.

¹⁴ *Detroit Common Council v. Rentz*, 91 Mich. 78; 16 L. R. A. 59; 51 N. W. 787.

¹⁵ *Farmers' Co-operative Creamery Co. v. Ins. Co.*, 112 Ia. 608; 84 N. W. 904; *Kimball v. Accident Association*, 90 Me. 183; 38 Atl. 102.

¹⁶ *Contra*, that shortening the time affects the remedy merely. *Jones v. Ins. Co.*, 110 Ia. 75; 46 L. R. A. 860; 81 N. W. 188.

question unless by a previous vote of the people, does not impair the obligation of contracts.¹⁷

The propositions in this section are true under the constitutional provision protecting the obligation of contracts. Other constitutional provisions may give different results. Thus under a provision, as in New Jersey, that the legislature shall not pass any law depriving any person of any remedy for enforcing a contract which existed when the contract was made, vested rights in remedies exist.¹⁸

§1766. Examples of change of remedy.

A statute which gives an additional remedy,¹ as where a municipal corporation is allowed to enforce certain contracts by mandamus,² or where forfeiture of the corporate charter is made a remedy for breach of a prior duty to keep a road in repair,³ or where a right to declare a forfeiture by judicial decree is given for failure to pay the interest on the purchase price of school lands sold by the state, in addition to the prior right to rescind for non-payment or to enforce a lien for the purchase price,⁴ or changes the penalty,⁵ or the landlord's remedy,⁶ in case a tenant wrongfully holds over after his term, or which gives a remedy more efficacious than the pre-existing remedies,⁷ or which takes away one out of several remedies,⁸

¹⁷ *Baltzer v. North Carolina*, 161 U. S. 240 (affirming 104 N. C. 265; 10 S. E. 153); and see *R. R. v. Alabama*, 101 U. S. 832; *R. R. v. Tennessee*, 101 U. S. 337.

¹⁸ *Western National Bank v. Reckless*, 96 Fed. 70; *Dexter v. Edmands*, 89 Fed. 467.

¹ *Hill v. Ins. Co.*, 134 U. S. 515.

² *New Orleans, etc., R. R. v. Louisiana*, 157 U. S. 219; affirming *State v. New Orleans, etc., R. R.*, 42 La. Ann. 550; 7 So. 606.

³ *Davis v. Road Co.*, 103 Ga. 491; 29 S. E. 475. (Even where no remedy was theretofore provided.)

⁴ *Standifer v. Wilson*, 93 Tex.

232; 54 S. W. 898; *Fristoe v. Blum*, 92 Tex. 76; 45 S. W. 988 (holding that in *Berrendo Stock Co. v. McCarty*, 85 Tex. 412; 21 S. W. 598, the court did not consider or pass upon this statute).

⁵ *Woodward v. Winehill*, 14 Wash. 394; 44 Pac. 860.

⁶ *Woods v. Soucy*, 166 Ill. 407; 47 N. E. 67.

⁷ *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641; 22 Pac. 860; *Webb v. Moore*, 25 Ind. 4; *Fonda v. Clark*, 43 Ia. 300; *Lapsley v. Brashears*, 4 Litt. (Ky.) 47.

⁸ Imprisonment for debt may be abolished as to pre-existing debts.

or which changes a remedy from a right of self-redress to a suit at law,⁹ or which provides that a decree providing for an accounting, or for enjoining or interfering with the prosecution of the business of any life insurance company or association can be granted only on the application of the attorney-general, except in certain named cases,¹⁰ or which changes the method of summoning a jury,¹¹ or commissioners,¹² or which changes the method of serving process on defendant,¹³ or in serving notice of appeal,¹⁴ or which requires a claim against a city to be presented to the council for allowance; and in case of disallowance requires the claimant if dissatisfied with the order of the council to give written notice of appeal, and furnish bond for costs,¹⁵ or which requires certain defenses to be specially pleaded, such as coverture,¹⁶ or which destroys a pre-existing right of set-off,¹⁷ or which gives an additional right of set-off,¹⁸ affects the remedy only and does not impair the obligation of pre-existing contracts.

A statute which permits an action against the personal representative of a deceased joint debtor before obtaining judgment against the surviving debtor, the prior law making the debt in legal effect joint and several, but providing that the surviving debtor must be sued first is valid.¹⁹ On the other hand, a stat-

Penniman's Case, 103 U. S. 714; Mason v. Haile, 12 Wheat. (U. S.) 370; Oriental Bank v. Freese, 18 Me. 109; 36 Am. Dec. 701. Mandamus may be taken away. Tennessee v. Sneed, 96 U. S. 69.

⁹ White v. Canal Co., 22 Colo. 191; 31 L. R. A. 828; 43 Pac. 1028.

¹⁰ Swan v. Life Association, 155 N. Y. 9; 49 N. E. 258.

¹¹ People v. Teague, 106 N. C. 576; 19 Am. St. Rep. 547; 11 S. E. 665.

¹² Williamsport, etc., Co. v. Startzman, 86 Md. 363; 39 L. R. A. 161; 38 Atl. 777.

¹³ Connecticut, etc., Ins. Co. v. Spratley, 99 Tenn. 322; 44 L. R. A. 442; 42 S. W. 145.

¹⁴ Oshkosh Waterworks Co. v. Oshkosh, 109 Wis. 208; 95 Am. St. Rep. 870; 85 N. W. 376.

¹⁵ Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437; affirming Oshkosh Waterworks Co. v. Oshkosh, 109 Wis. 208; 95 Am. St. Rep. 870; 85 N. W. 376.

¹⁶ Howard v. Gibson (Ky.), 60 S. W. 491.

¹⁷ New Orleans v. Waterworks Co., 142 U. S. 79.

¹⁸ Amy v. Taxing District, 114 U. S. 388; Charlotte Bank v. Hart, 67 N. C. 264.

¹⁹ Island Savings Bank v. Galvin, 20 R. I. 347; 39 Atl. 196, the court saying: "The change is simply in the time when the representatives

ute which, under cover of a change of parties, changes a claim against one party into a number of separate claims against several is invalid.²⁰

A statute which provides that after the dissolution of a corporation no action can be maintained against it, but that its assets are to be administered for the benefit of its creditors and stockholders is valid as applying to pre-existing debts.²¹

A statute giving a new trial as a matter of course may be repealed so as to take away such right from pre-existing causes of action, even if action has been begun, as long as the case has not been tried.²² On the other hand, after a case has been tried, the existing rights of the parties respectively to have a motion for a new trial granted or refused cannot be taken away by a subsequent statute.²³ So after the lapse of the time limited for filing a bill of exceptions a statute authorizing the court to extend the time for filing such bill impairs the obligation of contracts as to such prior actions.²⁴ A statute providing that the liability of a stockholder may be adjudicated in the same action as that brought against the corporation for the corporate debt, instead of by a subsequent action as formerly,²⁵ or giving exclusive jurisdiction of actions on stock subscriptions to Common-Law courts, instead of to courts of equity as before,²⁶ or a statute providing that assessments may be made upon the shares of stockholders in an insolvent corporation, and that an adjudication as to the amount of the debts and the amount due per share will be final, even as to stockholders not served personally,²⁷ are each valid as none impairs the obligation of prior contracts. On the other hand, a statute which attempts to take away the right of each creditor to sue any stockholder

may be sued and this is clearly a change of remedy only."

²⁰ *Dyett v. Hyman*, 129 N. Y. 351; 26 Am. St. Rep. 533; 29 N. E. 261.

²¹ *Nelson v. Hubbard*, 96 Ala. 238; 17 L. R. A. 375; 11 So. 428.

²² *People v. District Court*, 28 Colo. 161; 63 Pac. 321.

²³ *In re Handley's Estate*, 15

Utah 212; 62 Am. St. Rep. 926; 49 Pac. 829.

²⁴ *Johnson v. Gebhauer*, 159 Ind. 271; 64 N. E. 855.

²⁵ *Hill v. Ins. Co.*, 134 U. S. 515.

²⁶ *Antoni v. Greenhow*, 107 U. S. 769; *Shickell v. Improvement Co.*, 99 Va. 88; 37 S. E. 813.

²⁷ *Straw, etc., Mfg. Co. v. Shoe Co.*, 80 Minn. 125; 83 N. W. 36.

for his individual benefit, and to substitute therefor an action to be brought by the receiver of an insolvent corporation against all the stockholders for the benefit of all the creditors, has been held invalid.²⁸ A similar result is of course reached under a constitutional provision forbidding the legislature to pass any law depriving any person for any remedy for enforcing a contract which existed when the contract was made.²⁹

§1767. Change in statutes of limitation.

A statute of limitations which restricts the time for bringing an action on pre-existing contract rights does not impair the obligation of such contracts if it gives a reasonable time after it is promulgated for bringing actions on such pre-existing contract rights.¹ Thus a statute hastening the time of sale for delinquent taxes,² or for enforcing a mechanic's lien,³ or one providing that the right to foreclose a mortgage is barred when the debt is barred,⁴ or one providing that unless assign-

²⁸ Webster v. Bowers, 104 Fed. 627; Evans v. Nellis, 101 Fed. 920.

²⁹ Western National Bank v. Reckless, 96 Fed. 70.

¹ Davis v. Mills, 194 U. S. 451; Turner v. New York, 168 U. S. 90 (affirming People v. Turner, 145 N. Y. 451; 40 N. E. 400; s. c., 117 N. Y. 227; 22 N. E. 1022); Bear Lake, etc., Co. v. Garland, 164 U. S. 1; Wheeler v. Jackson, 137 U. S. 245; Mitchell v. Clark, 110 U. S. 633; Gilfillan v. Canal Co., 109 U. S. 401; Vance v. Vance, 108 U. S. 514; Terry v. Anderson, 95 U. S. 628; Sohn v. Waterson, 17 Wall. (U. S.) 596; Ross v. Duval, 13 Pet. (U. S.) 45; Hill v. Gregory, 64 Ark. 317; 42 S. W. 408; Tucker v. Harris, 13 Ga. 1; 58 Am. Dec. 488; Boston v. Cummins, 16 Ga. 102; 60 Am. Dec. 717; Ryhiner v. Frank, 105 Ill. 326; Connecticut, etc., Co. v. Talbot, 113 Ind. 373; 3 Am. St. Rep. 655; 14 N. E. 586; Elliott v.

Lochnane, 1 Kan. 126; Louisville, etc., R. R. v. Williams, 103 Ky. 375; 45 S. W. 229; Howard v. Ins. Co., 13 B. Mon. (Ky.) 282; Kingley v. Cousins, 47 Me. 91; Muirhead v. Sands, 111 Mich. 487; 69 N. W. 826; Watson v. Doherty, 56 Miss. 628; Cranor v. School District, 81 Mo. App. 152; Guiterman v. Wishon, 21 Mont. 458; 54 Pac. 566; Bartol v. Eckert, 50 O. S. 31; 33 N. E. 294; Kenyon v. Stewart, 44 Pa. St. 179; Landa v. Obert, 78 Tex. 33; 14 S. W. 297; Lawton v. Waite, 103 Wis. 244; 45 L. R. A. 616; 79 N. W. 321. This rule applies to adverse possession. Power v. Kitching, 10 N. D. 254; 88 Am. St. Rep. 691; 86 N. W. 737.

² Muirhead v. Sands, 111 Mich. 487; 69 N. W. 826.

³ Bear Lake, etc., Co. v. Garland, 164 U. S. 1.

⁴ Hill v. Gregory, 64 Ark. 317; 42 S. W. 408.

ments of real estate mortgages are recorded within six months from the time that they are made, they cannot be used in evidence against the mortgagor,⁵ or one denying the right of attacking a judgment on the ground of mistake after three years if a *bona fide* purchaser has, in reliance on such judgment, acquired an interest in the realty,⁶ or changing the time for suing on a judgment,⁷ or the time for filing an abstract thereof so as to make it a lien on realty,⁸ are not invalid as impairing the obligation of contracts. If, on the other hand, a change in the statute of limitations bars causes of action at the time that the statute is promulgated,⁹ or does not give a reasonable time after its promulgation for enforcing a pre-existing contract right,¹⁰ it is invalid as impairing the obligation of contracts.

What is a reasonable time in the application of this rule depends on the circumstances of each particular case. Nine years,¹¹ three years,¹² one year,¹³ ten months,¹⁴ and nine and one half months,¹⁵ have each been held reasonable. If a reasonable time is in fact given, it is not necessary that its duration should be fixed when the statute of limitations is

⁵ *Myers v. Wheelock*, 60 Kan. 747; 57 Pac. 956; and see on the same point, *Citizens' State Bank v. Julian*, 153 Ind. 655; 55 N. E. 1007.

⁶ *Drew v. St. Paul*, 44 Minn. 501; 47 N. W. 158.

⁷ *Ross v. Duval*, 13 Pet. (U. S.) 45; *Bartal v. Eckert*, 50 O. S. 31; 33 N. E. 294.

⁸ *Spencer v. Rippe*, 7 Okla. 608; 56 Pac. 1070.

⁹ *Rock Island National Bank v. Thompson*, 173 Ill. 593; 64 Am. St. Rep. 137; 50 N. E. 1089; *Norris v. Tripp*, 111 Ia. 115; 82 N. W. 610; *Casady v. Grimmelman*, 108 Ia. 695; 77 N. W. 1067; *Gilbert v. Ackerman*, 159 N. Y. 118; 45 L. R. A. 118; 53 N. E. 753.

¹⁰ *Wheeler v. Jackson*, 137 U. S. 245; *Sohn v. Waterson*, 17 Wall. (U. S.) 596; *Rock Island National*

Bank v. Thompson, 173 Ill. 593; 64 Am. St. Rep. 137; 50 N. E. 1089; *Dobbins v. Bank*, 112 Ill. 553; *Pearce v. Patton*, 7 B. Mon. (Ky.) 162; 45 Am. Dec. 61; *Cranor v. School District*, 151 Mo. 119; 52 S. W. 232; *Osborne v. Lindstrom*, 9 N. D. 1; 81 Am. St. Rep. 516; 46 L. R. A. 715; 81 N. W. 72; *Relyea v. Pulp Co.*, 102 Wis. 301; 72 Am. St. Rep. 878; 78 N. W. 412.

¹¹ *Bartol v. Eckert*, 50 O. S. 31; 33 N. E. 294.

¹² *Korn v. Browne*, 64 Pa. St. 55.

¹³ *Lockhart v. Yeiser*, 2 Bush. (Ky.) 231.

¹⁴ *Osborne v. Lindstrom*, 9 N. D. 1; 81 Am. St. Rep. 516; 46 L. R. A. 715; 81 N. W. 72.

¹⁵ *Terry v. Anderson*, 95 U. S. 628.

shortened.¹⁶ Thus in jurisdictions where time is counted from the passage of the act, a statute to go into effect when the revision of the statutes then pending, was completed, was held valid, such revision having been completed ten months after the statute was passed.¹⁷ A change in statute extending the period of limitations is valid as to a claim not yet barred.¹⁸ If a cause of action has once been barred by limitations a subsequent statute cannot extend the period for bringing action so as to revive such right.¹⁹ Thus a statute providing that a judgment and sale for taxes should not be set aside unless action was brought in nine months from the date of the sale cannot by being repealed after that period has elapsed, deprive purchasers of its protection.²⁰ Some of the cases used to support this proposition are illustrations of non-claim of debts due from a decedent's estate.²¹ This rule seems to apply to torts as well as to contracts.²² A right of appeal, or of prosecuting error, which has once expired cannot be revived by subsequent statute.²³

¹⁶ Merchants' National Bank v. Braithwaite, 7 N. D. 358; 66 Am. St. Rep. 653; 75 N. W. 244.

¹⁷ Osborne v. Lindstrom, 9 N. D. 1; 81 Am. St. Rep. 516; 46 L. R. A. 715; 81 N. W. 72. *Contra*, that as to prior causes, a definite time in which to sue must be given. Ludwig v. Stewart, 32 Mich. 27.

¹⁸ Bowman v. Colfax, 17 Wash. 344; 49 Pac. 551.

¹⁹ Bradford v. Shine, 13 Fla. 393; 7 Am. Rep. 239; Fish v. Farwell, 160 Ill. 236; 43 N. E. 367; Normal School v. Blodgett, 155 Ill. 441; 46 Am. St. Rep. 348; 31 L. R. A. 70; 40 N. E. 1025; Right v. Martin, 11 Ind. 123; Woart v. Winnick, 3 N. H. 473; 14 Am. Dec. 384; Ireland v. Mackintosh, 22 Utah 296; 61 Pac. 901; Wires v. Farr, 25 Vt. 41; Brown v. Parker, 28 Wis. 21. "A right of defense against a money demand, arising from the complete running of the statute of limita-

tions, is property within the protection of the constitutional guaranty of due process of law." Fish v. Farwell, 160 Ill. 236, 252; 43 N. E. 367.

²⁰ Whitney v. Wegler, 54 Minn. 235; 55 N. W. 927. For other cases of tax-liens see McCracken County v. Trust Co., 84 Ky. 344; 1 S. W. 585; Kipp v. Elwell, 65 Minn. 525; 33 L. R. A. 435; 68 N. W. 105; Bowman v. Colfax, 17 Wash. 344; 49 Pac. 551.

²¹ Bradford v. Shine, 13 Fla. 393; 7 Am. Rep. 239; Ryder v. Wilson 41 N. J. L. 9.

²² Lawrence v. Louisville, 96 Ky 595; 49 Am. St. Rep. 309; 27 L. R. A. 560; 29 S. W. 450; Mynatt v. Hubbs, 6 Heisk. (Tenn.) 320; Eingartner v. Steel Co., 103 Wis. 373; 74 Am. St. Rep. 871; 79 N. W. 433.

²³ Atkinson v. Dunlap, 50 Me. 111; Germania Savings Bank v. Suspension Bridge, 159 N. Y. 362;

A contrary rule, namely, that if the statute of limitations merely gives a defense and does not vest property rights, it may be extended so as to revive claims already barred, has been followed by the Supreme Court of the United States,²⁴ and by some of the state courts,²⁵ while in others it has been left an open question.²⁶

§1768. Ancillary and provisional remedies.

Ancillary and provisional remedies are not a part of the obligation of a contract, and may be altered if adequate remedies are left. A statute which strikes out a prior ground of attachment,¹ is held to affect the remedy only, and not to impair the obligation of prior contracts, even if an attachment has already been levied, as long as the claim has not been put in judgment.² This is true of Federal statutes; but here of course is the additional consideration that Congress is not restrained by this provision.³

A statute which gives an additional remedy by authorizing an attachment before the debt is due does not impair the obligation of pre-existing contract obligations.⁴ So a statute providing that if the trustee in garnishment pays a final judgment against the defendant in whole or in part, such payment

54 N. E. 33; *Trim v. McPherson*, 7 Coldw. (Tenn.) 15.

²⁴ "No man promises to pay money with a view of being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says that time shall be no bar though such was the case when the contract was made." *Campbell v. Holt*, 115 U. S. 620, 628; quoted in *Bates v. Cullum*, 177 Pa. St. 633; 55 Am. St. Rep. 753; 34 L. R. A. 440; 35 Atl. 861.

²⁵ *Swickard v. Bailey*, 3 Kan. 507; *Hulbert v. Clark*, 128 N. Y. 295; 14 L. R. A. 59; 28 N. E. 638; *Bates v. Cullum*, 177 Pa. St. 633;

55 Am. St. Rep. 753; 34 L. R. A. 440; 35 Atl. 861. So in a suit for back taxes. *McEldowney v. Wyatt*, 44 W. Va. 711; 45 L. R. A. 609; 30 S. E. 239.

²⁶ *Ball v. Wyeth*, 99 Mass. 338; *Prentice v. Dehon*, 10 All. (Mass.) 353.

¹ *Day v. Madden*, 9 Colo. App. 464; 48 Pac. 1053.

² *Day v. Madden*, 9 Colo. App. 464; 48 Pac. 1053.

³ *Evans-Snider-Buel Co. v. McFadden*, 105 Fed. 293; 44 C. C. A. 494; 58 L. R. A. 900.

⁴ *Mosher v. Bay* Circuit Judge, 108 Mich. 503; 66 N. W. 384.

shall to that extent discharge his liability as to plaintiff and defendant, is not invalid as impairing the obligation of prior debts due to a non-resident debtor.⁵ A statute which avoids a lien obtained by attachment,⁶ or by levy and execution,⁷ in the event of an assignment for the benefit of creditors within a specified time after such lien is obtained, is invalid as to debts contracted before such statute is passed. It will be noticed, however, that such a statute takes away every remedy whereby the creditor can obtain a priority through diligence; and leaves his only remedy that of presenting his claim to the assignee for the benefit of creditors. The same result has been reached as to a mortgage given before a state statute was passed avoiding mortgages given four months before insolvency proceedings were begun.⁸ These cases have been placed by the courts, however, on the broad but unsafe principle that the remedy is a part of the contract.⁹ A contrary result has been reached under section 67f of the National Bankrupt Act of 1898, the court holding that it did not impair the obligation of existing contracts to provide that an adjudication of bankruptcy should discharge all liens obtained through legal proceedings within four months prior to the filing of the petition in bankruptcy against the debtor.¹⁰ However, Congress is not subject to this constitutional provision, and the act would be valid even though it did impair the obligation of contracts.

§1769. Change in right to acquire a lien.

The right to acquire a lien is most frequently illustrated at Modern Law by mechanic's liens, though it is of course not limited to liens of this class. Whether the right to acquire a

⁵ Cross v. Brown, 19 R. I. 220; 33 Atl. 147.

⁶ Wilson v. Brochon, 95 Fed. 82; Heath, etc., Mfg. Co. v. Paint Co., 83 Fed. 776; Peninsular, etc., Co. v. Paint Co., 100 Wis. 488; 69 Am. St. Rep. 934; 42 L. R. A. 331; 76 N. W. 359.

⁷ Second Ward Savings Bank v.

Schranck, 97 Wis. 250; 39 L. R. A. 569; 73 N. W. 31.

⁸ Chipman v. Peabody, 88 Me 282; 34 Atl. 77.

⁹ Peninsular, etc., Works v. Paint Co., 100 Wis. 488; 69 Am. St. Rep. 934; 42 L. R. A. 331; 76 N. W. 359.

¹⁰ In re Rhoads, 98 Fed. 399.

mechanic's lien is a part of the contract under which the work is done or the material is furnished, or whether it is a remedy merely, is a question upon which there is a conflict in authority. Some authorities hold that a right to the lien vests at least when the material is furnished,¹ or according to some expressions of opinion, even when the contract is made,² and that no statute passed thereafter can take away the right to such lien.³ Other authorities hold that the right to a lien is merely a remedy cumulative to the Common-Law right of action upon the contract,⁴ and that accordingly the right to acquire such a lien may be taken away by a statute passed after the contract is made and the services rendered or materials furnished thereunder but before the lien has become fixed.⁵ In any event, the courts will construe a statute, if possible, so as to preserve a right to a lien, given by a former statute, which is repealed by the later one.⁶ Even where the right to acquire a lien cannot be taken away, the method of enforcing it may be changed by a subsequent statute if some adequate means of enforcing it is left.⁷ Thus where the pre-existing law permitted a mechanic's lien to be taken on a building upon which work has

¹ *Goodbub v. Estate of Hornung*, 127 Ind. 181; 26 N. E. 770; *Groesbeck v. Barger*, 1 Kan. App. 61; 41 Pac. 204.

² *Spangler v. Green*, 21 Colo. 505; 52 Am. St. Rep. 259; 42 Pac. 674; *Hall v. Banks*, 79 Wis. 229; 48 N. W. 385.

³ *Spangler v. Green*, 21 Colo. 505; 52 Am. St. Rep. 259; 42 Pac. 674; *Goodbub v. Estate of Hornung*, 127 Ind. 181; 26 N. E. 770; *Weaver v. Sells*, 10 Kan. 610; *Kirkwood v. Hoxie*, 95 Mich. 62; 35 Am. St. Rep. 549; 54 N. W. 720; *Tell v. Woodruff*, 45 Minn. 10; 457 N. W. 262; *Warren v. Woodward*, 70 N. C. 382; *The Gazelle v. Lake*, 1 Or. 120; *Phillips v. Mason*, 7 Heisk. (Tenn.) 61; *Streubel v. Railroad Co.*, 12 Wis. 71.

⁴ *Templeton v. Horne*, 82 Ill. 491; *Smith v. Bell*, 70 Ill. App. 490; *Wilson v. Simon*, 91 Md. 1; 80 Am. St. Rep. 427; 45 Atl. 1022.

⁵ *Wilson v. Simon*, 91 Md. 1; 80 Am. St. Rep. 427; 45 Atl. 1022.

⁶ "The evident intention of Sec. 24 of the act of 1862 was to save and preserve to the claimants all rights and liens acquired under pre-existing laws which were then repealed, and which, but for such saving clause, would have been liable to be lost by such repeal." *McCrea v. Craig*, 23 Cal. 522, 525.

⁷ *Phelps-Bigelow Windmill Co. v. Trust Co.*, 62 Kan. 529; 64 Pac. 63; *Groesbeck v. Barger*, 1 Kan. App. 61; 41 Pac. 204.

been done or material furnished, and provided that such building might be sold separate from the land if the land was encumbered by a prior mortgage, a statute passed providing that the land and building may be sold together if the court finds that it is for the best interests of all parties so to do, the proceeds being so distributed as to secure the same relative priority as before may be applied, though the rights of the parties were fixed before the later statute was passed.⁸ On the other hand, the time within which a lien may be acquired may be changed by legislative enactment after the right to secure the lien exists, but before the lien is acquired, if a reasonable time is given after the passage of such statute to secure such lien.⁹ A subsequent statute may give a mechanic's lien where none existed before, since it is in this case clearly a remedy cumulative to the Common-Law right of action on the contract.¹⁰ However, a statute which gives additional rights to a subcontractor and which relieves him from filing a notice of his lien, has been held to impair the obligation of the original contract made before such statute was passed.¹¹ This is especially true if the statute gives the subcontractors liens without regard to the price agreed upon between the owner of the building and the original contractor.¹² So a statute giving to a corporation a lien upon its stock for debts or liabilities due to it from a stockholder is valid as to liabilities for subscriptions already incurred.¹³ So a statute, passed after A has died and his debts have become a lien on his realty, allowing executors to borrow money to pay decedents' debts and to give mortgages on decedent's realty is valid as to A's estate, as it merely changes the form of the lien.¹⁴

⁸ Red River Valley National Bank v. Craig, 181 U. S. 548 (affirming Craig v. Herzman, 9 N. D. 140; 81 N. W. 288).

⁹ Kerckhoff-Cuzner, etc., Co. v. Olmstead, 85 Cal. 80; 24 Pac. 648.

¹⁰ Templeton v. Horne, 82 Ill. 491; Bolton v. Johns, 5 Pa. St. 145; 47 Am. Dec. 404. *Contra*, Smith v. Bell, 70 Ill. App. 490.

¹¹ Spangler v. Green, 21 Colo. 505; 52 Am. St. Rep. 259; 42 Pac. 674.

¹² Hall v. Banks, 79 Wis. 229; 48 N. W. 385.

¹³ Tutwiler v. Tuskaloosa, etc., Co., 89 Ala. 391; 7 So. 398.

¹⁴ Murphy v. Bank, 131 Cal. 115; 63 Pac. 368.

§1770. Change in priority of vested liens.

A lien which has attached to property,¹ such as a mechanic's lien,² or a judgment lien,³ or a lien on logs obtained by a laborer,⁴ or the lien of a mortgage,⁵ or the lien of a corporation on the shares of its stockholders for debts due it from them,⁶ cannot be divested by a subsequent statute, nor can its priority be affected. Thus a curative statute cannot change the pre-existing order of priority of liens,⁷ nor can a judgment which is a lien by force of the statute be divested by a subsequent statute requiring a transcript to be filed in each county to make the judgment a lien.⁸ A conveyance made before the statute is passed cannot be made subordinate to a lien acquired after the statute is passed.⁹ Thus mortgages given before the passage of statutes attempting to make them inferior in priority to a subsequently acquired lien for grain furnished as seed,¹⁰ or to a subsequent claim for wages,¹¹ or to a homestead, void under the law in force when the mortgage was given because not then

¹ Florence, etc., Co. v. Hanby, 101 Ala. 15; 13 So. 343.

² Florence, etc., Co. v. Hanby, 101 Ala. 15; 13 So. 343; McFadden v. Blocker, 2 Ind. Ter. 260; 58 L. R. A. 878; 48 S. W. 1043.

³ Edwards v. Kearzey, 96 U. S. 595; Rock Island National Bank v. Thompson, 173 Ill. 593; 64 Am. St. Rep. 137; 50 N. E. 1089; Gilman v. Tucker, 128 N. Y. 190; 26 Am. St. Rep. 464; 13 L. R. A. 304; 28 N. E. 1040; Merchants' Bank v. Ballou, 98 Va. 112; 81 Am. St. Rep. 715; 44 L. R. A. 306; 32 S. E. 481.

⁴ Garneau v. Mill Co., 8 Wash. 467; 36 Pac. 463.

⁵ Barnitz v. Beverly, 163 U. S. 118; Toledo, etc., Ry. v. Hamilton, 134 U. S. 296; Central Trust Co. v. Ry., 65 Fed. 257; Shrigley v. Black, 66 Kan. 213; 71 Pac. 301; Blouin v. Ledet, 109 La. 709; 33

So. 741; Vicksburg, etc., Ry. v. Sledge, 41 La. Ann. 896; 6 So. 725; Chipman v. Peabody, 88 Me. 282; 34 Atl. 77; Yeatman v. King, 2 N. D. 421; 33 Am. St. Rep. 797; 51 N. W. 721; Giles v. Stanton, 86 Tex. 620; 26 S. W. 615.

⁶ H. W. Wright Lumber Co. v. Hixon, 105 Wis. 153; 80 N. W. 1110, 1135.

⁷ Merchants' Bank v. Ballou, 98 Va. 112; 81 Am. St. Rep. 715; 44 L. R. A. 306; 32 S. E. 481.

⁸ Rock Island National Bank v. Thompson, 173 Ill. 593; 64 Am. St. Rep. 137; 50 N. E. 1089.

⁹ Crowther v. Safe-Deposit Co., 85 Fed. 41; 29 C. C. A. 1.

¹⁰ Yeatman v. King, 2 N. D. 421; 33 Am. St. Rep. 797; 51 N. W. 721.

¹¹ Giles v. Stanton, 86 Tex. 620; 26 S. W. 615.

recorded,¹² or to a subsequent judgment for personal injuries,¹³ cannot be so postponed. So a statute which attempts to divest the lien of an assessment on the abutting realty for the entire contract price and to make the claim for intersections a personal liability of the city, unsecured by lien, is invalid.¹⁴

§1771. Change in the law of evidence.

It is generally said that no person has a vested right in rules of evidence.¹ Hence the law concerning the competency of witnesses in force at the time of the trial, and not that in force when the contract is entered into, controls.² Thus A conveyed to B and B married C. A died. The conveyance from A to B was attacked. C was held to be a competent witness because she was not a party to the contract or cause of action on trial.³ The judgment below was reversed. Before the second trial a statute was passed providing that no party to a suit or proceeding whose right of action or defense is derived from one who is or, if living, would be incompetent to testify, shall be admitted to testify. This statute was held to apply to a new trial of this cause.⁴ On the other hand, "subsequent legislation which affects unreasonable changes in the rules of evidence." of a subsisting contract "impairs the obligations of the contract

¹² *Blouin v. Ledet*, 109 La. 709; 33 So. 741.

¹³ *Central Trust Co. v. Ry.*, 65 Fed. 257.

¹⁴ *Soule v. Seattle*, 6 Wash. 315; 33 Pac. 384, 1080. (However, a change in the method of assessment from assessment according to valuation to assessment according to frontage does not impair the obligation of a contract for such improvement.)

¹ *Callanan v. Hurley*, 93 U. S. 387; *Bannon v. Burnes*, 39 Fed. 892; *Martin v. Cole*, 38 Ia. 141; *Immegart v. Gorgas*, 41 Ia. 439; *Morrill v. Douglass*, 17 Kan. 291; *In re Douglas*, 41 La. Ann. 765; 6

So. 675; *Virden v. Bowers*, 55 Miss. 1; *Bell v. Coats*, 54 Miss. 538; *Griffin v. Dogan*, 48 Miss. 11; *Raley v. Guinn*, 76 Mo. 263; *Abbott v. Lindenbower*, 42 Mo. 162; *O'Bryan v. Allen*, 108 Mo. 227; 32 Am. St. Rep. 595; 18 S. W. 892; *Ensign v. Barse*, 107 N. Y. 329; 14 N. E. 400; 15 N. E. 401; *Brown v. Slauson*, 23 Wis. 245; *Smith v. Cleveland*, 17 Wis. 556.

² *O'Bryan v. Allen*, 108 Mo. 227; 32 Am. St. Rep. 595; 18 S. W. 892.

³ *O'Bryan v. Allen*, 95 Mo. 68; 8 S. W. 225.

⁴ *O'Bryan v. Allen*, 108 Mo. 227; 32 Am. St. Rep. 595; 18 S. W. 892.

within the restriction of the Federal Constitution.”⁵ An unreasonable change in the rules of evidence is therefore void as applicable to pre-existing contracts.⁶ The application of so general a rule as this to specific states of fact results in some contradictory decisions. If a subsequent statute makes it impossible to prove a material or relevant fact, which under the law of evidence in force when the contract right was acquired could have been proved, it impairs the obligation of such prior contract.⁷ Thus a statute which provides that evidence of certain land claims shall not be admitted unless archived or recorded is unconstitutional as against prior claims the evidence of which consists of original public documents in the custody of the Mexican government, since the originals cannot be obtained for record and the statute makes no provision for recording copies.⁸ If the change in the law of evidence does not make proof of the fact in question absolutely impossible, but does make it so burdensome as to be practically impossible, the statute is unconstitutional. Thus certain bonds with detachable interest coupons had been issued by the state of Virginia. Many of these coupons had been detached and sold. A subsequent statute of Virginia provided that such coupons could be collected only on producing the original bond from which they had been cut. This requirement was held by the Supreme Court of the United States to be “an unreasonable condition, in many cases impossible to be performed,” and

⁵ *Davis v. Supreme Lodge*, 165 N. Y. 159; 58 N. E. 891.

⁶ *McGahey v. Virginia*, 135 U. S. 662; *Davis v. Supreme Lodge*, 165 N. Y. 159; 58 N. E. 891.

⁷ A statute “which forbids the introduction of evidence of a prior contract, admissible and made necessary to the validity and existence of the contract by the law in force at the time it was made, unless it provides some other method of making sufficient proof of the necessary facts accessible to the person called

upon to make the proof, it seems to us impairs the obligation of a contract as fully as though such subsequent law in terms declared that the contract should no longer be operative or be enforced through the courts, for it destroys the only means through which the contract may be established or enforced.” *Texas-Mexican Ry. v. Locke*, 74 Tex. 370, 399; 12 S. W. 80.

⁸ *Texas-Mexican Ry. v. Locke*, 74 Tex. 370; 12 S. W. 80.

hence invalid.⁹ This statute further forbade proof of the genuineness of the coupons by expert evidence. The state court had held such statute to be constitutional.¹⁰

In some cases changes in the law of evidence, making admissible evidence which before was inadmissible, is held to impair the obligation of contracts as to the party prejudiced thereby. So a statute providing that oral evidence is admissible to identify land insufficiently described in a written contract within the statute of frauds cannot apply to a prior contract.¹¹

This principle has even been applied to a change in rules affecting competency of witnesses. Thus where a physician was incompetent to testify as to knowledge acquired by him in professional confidence, and hence could not testify as to the cause of the death of certain relatives of the insured so as to defeat the policy by showing the falsity of certain statements in the application, a subsequent statute making him competent has been held not to apply to pre-existing contracts.¹² A conclusive presumption is really a rule of substantive law; and a statute creating a conclusive presumption really creates a new rule of substantive law. Thus a statute making a tax deed conclusive evidence of a fee has been held invalid.¹³ The converse of this proposition is not always true. By the weight of authority a presumption which was conclusive when contract rights were acquired may be modified by statute so as to be *prima facie* only. Thus after a tax sale, a statute destroying the conclusive effect of a tax deed and making it *prima facie* only, does not impair the obligation of the contract with

⁹ McGahey v. Virginia, 135 U. S. 662.

¹⁰ Cornwall v. Commonwealth, 82 Va. 644; 3 Am. St. Rep. 121.

¹¹ Lowe v. Harris, 112 N. C. 472; 22 L. R. A. 379; 17 S. E. 539. (The contract in question was as follows: "Wilkesboro, N. C., Apr. 19, 1880. James Harris has paid the twenty dollars on his land. Owes me six more on it." The statute was passed in 1891.)

¹² Davis v. Supreme Lodge, 165 N. Y. 159; 58 N. E. 891. The real point of this decision was that the subsequent statute was not intended to alter the former rule of evidence. This result was in part reached, however, because any other construction would have rendered the new statute unconstitutional.

¹³ Dawson v. Peter, 119 Mich. 274; 77 N. W. 997.

the purchaser.¹⁴ So a statute which makes a tax deed conclusive as to all but jurisdictional facts is held valid,¹⁵ as where it is made conclusive as to the fact that the tax is duly levied and that the necessary prerequisites have been complied with by the public officials,¹⁶ or as to every fact necessary to its validity except that the tax has not been paid and that the realty is not exempt from taxation.¹⁷

§1772. Damages.

The amount of damages given by the law in case of breach is looked upon as an element of the contract itself, so that a change in the measure of damages impairs the obligation of prior contracts.¹ While this rule is well-settled, it is also held that a different remedy not involving damages may be given. Thus specific relief, as by mandamus,² or coercive enforcement as by forfeiture,³ may be added.

§1773. Delay of judgment and execution.

Statutes which provide that debts of certain classes or due from certain persons cannot be recovered upon for certain periods have been held valid.¹ This holding is undoubtedly due in part to the fact that such statutes have generally been enacted on account of war. A statute giving the defendant in a foreclosure suit six months in which to answer is valid,

¹⁴ *Harris v. Harsch*, 29 Or. 562; 46 Pac. 141; *Strode v. Washer*, 17 Or. 50; 16 Pac. 926. *Contra*, *Tracy v. Reed*, 38 Fed. 69; 2 L. R. A. 773; *Marx v. Hanthorn*, 30 Fed. 579; 12 Sawy. 377; *Smith v. Cleveland*, 17 Wis. 556.

¹⁵ *Roberts v. Bank*, 8 N. D. 504; 79 N. W. 1049.

¹⁶ *Tibbler v. Land Trust*, 49 La. Ann. 1471; 22 So. 411.

¹⁷ *State v. Whittlesey*, 17 Wash. 447; 50 Pac. 119.

¹ *Effinger v. Kenney*, 115 U. S. 536. A statute providing for the

recovery of an attorney's fee by the plaintiff, if successful, has been held not to violate this principle. *Dowell v. Paving Co.*, 138 Ind. 675; 38 N. E. 389.

² *New Orleans, etc., Ry. v. Louisiana*, 157 U. S. 219; affirming *State v. New Orleans, etc., Ry. Co.*, 42 La. Ann. 550; 7 So. 606.

³ *Davis v. Road Co.*, 103 Ga. 491; 29 S. E. 475; *Standifer v. Wilson*, 93 Tex. 232; 54 S. W. 898.

¹ *Barkley v. Glover*, 3 Met. (Ky.) 44; *Johnson v. Higgins*, 3 Met. (Ky.) 566.

even though applying to pre-existing mortgages.² Statutes providing for delay in issuing execution, the judgment being allowed to be rendered,³ have been held invalid.

§1774. Change in appraisement laws.

A change in statute providing for an appraisement if none was required before, the property not to be sold for less than a certain per cent of the appraised value,¹ impairs the obligation of prior contracts. On the other hand, a statute which takes away a former right of appraisement is valid.²

§1775. Change in exemption laws.

Statutes which exempt from levy and sale on execution, property which was not exempt when the contract was entered into are held by the majority of our courts to be invalid as impairing the obligation of contracts.¹ Thus a statute exempting wages,² or life insurance,³ or a homestead,⁴ as a homestead purchased with pension money,⁵ or one restricting a written waiver of exemptions which had before that time been held

² Von Baumbach v. Bade, 9 Wis. 559; 76 Am. Dec. 283.

³ Strong v. Daniel, 5 Ind. 348; Webster v. Rose, 6 Heisk. (Tenn.) 93; 19 Am. Rep. 583. *Contra*, Holloway v. Sherman, 12 Ia. 282; 79 Am. Dec. 537.

¹ Swinburne v. Mills, 17 Wash. 611; 61 Am. St. Rep. 932; 50 Pac. 489 (citing McCracken v. Hayward, 2 How. (U. S.) 608).

² Phelps-Bigelow Windmill Co. v. Trust Co., 62 Kan. 529; 64 Pac. 63.

¹ Edwards v. Kearzey, 96 U. S. 595; Gunn v. Barry, 15 Wall. (U. S.) 610; reversing 44 Ga. 351; Adams v. Creen, 100 Ala. 218; 14 So. 54; Wilson v. Brown, 58 Ala. 62; 29 Am. Rep. 727; Willard v. Sturm, 96 Ia. 555; 65 N. W. 847;

Foster v. Byrne, 76 Ia. 295; 35 N. W. 513; 41 N. W. 22; Dunn v. Stevens, 62 Minn. 380; 64 N. W. 924; 65 N. W. 348; Johnson v. Fletcher, 54 Miss. 628; 28 Am. Rep. 388; Trimmier v. Winsmith, 41 S. C. 109; 19 S. E. 283; Skinner v. Holt, 9 S. D. 427; 62 Am. St. Rep. 878; 69 N. W. 595.

² Willard v. Sturm, 96 Ia. 555; 65 N. W. 847.

³ Rice v. Smith, 72 Miss. 42; 16 So. 417; Skinner v. Holt, 9 S. D. 427; 62 Am. St. Rep. 878; 69 N. W. 595.

⁴ Dunn v. Stevens, 62 Minn. 380; 64 N. W. 924; 65 N. W. 348; Trimmier v. Winsmith, 41 S. C. 109; 19 S. E. 283.

⁵ Foster v. Byrne, 76 Ia. 295; 35 N. W. 513; 41 N. W. 22.

valid,⁶ are each unconstitutional. Such exemption laws are especially invalid if the claim is reduced to judgment before the law is passed, though an appeal is pending.⁷ Thus after a decree declaring the proceeds of certain life-insurance policies to be a part of the estate of the insured, the rights of creditors cannot be affected by a subsequent statute exempting life insurance policies from being applied to the debts of the insured.⁸ On the same principle a statute restoring the Common-Law right of dower is invalid as to prior creditors of a married man.⁹ Some authorities of considerable numerical strength hold that exemption laws affect the remedy primarily and not the right; that they are not invalid as impairing the obligation of contracts, at least if they are reasonable in the extent of the protection which they afford to the debtor.¹⁰ Thus an exemption of a homestead,¹¹ or an exemption of personal earnings from attachment,¹² is not invalid as to prior debts. Some authorities distinguish between the validity of exemption laws as applying to property then owned, or to that acquired after the statute takes effect, holding such laws valid as to the latter but invalid as to the former. Thus a statute relieving the produce of a married woman's lands from liability for her husband's debts is valid as to products subsequently grown, though the debt in question was incurred before the statute was passed.¹³ It may be here observed that the debtor has no vested right in his

⁶ *Adams v. Creen*, 100 Ala. 218; 14 So. 54.

⁷ *Skinner v. Holt*, 9 S. D. 427; 62 Am. St. Rep. 878; 69 N. W. 595.

⁸ *Skinner v. Holt*, 9 S. D. 427; 62 Am. St. Rep. 878; 69 N. W. 595.

⁹ *Patton v. Asheville*, 109 N. C. 685; 14 S. E. 92. *Contra*, *Currier v. Elliott*, 141 Ind. 394; 39 N. E. 554.

¹⁰ *Taylor v. Stockwell*, 66 Ind. 505; *Bigelow v. Pritchard*, 21 Pick. (Mass.) 169; *Dye v. Cooke*, 88 Tenn. 275; 17 Am. St. Rep. 882; 12 S. W. 631; *Folsom v. Asper*, 25 Utah 299; 71 Pac. 315; *Kirkman v. Bird*, 22

Utah 100; 83 Am. St. Rep. 774; 58 L. R. A. 669; 61 Pac. 338. In addition to the cases cited in this note, many early cases, taking this position, have been overruled by the cases cited in the first note in this section.

¹¹ *Dye v. Cooke*, 88 Tenn. 275; 17 Am. St. Rep. 882; 12 S. W. 631.

¹² *Kirkman v. Bird*, 22 Utah 100; 83 Am. St. Rep. 774; 58 L. R. A. 669; 61 Pac. 338.

¹³ *Niles v. Hall*, 64 Vt. 453; 25 Atl. 479. *Contra*, *Johnson v. Fletcher*, 54 Miss. 628; 28 Am. Rep. 388.

exemptions. Accordingly, a statute diminishing the amount which he may hold exempt does not impair the obligation of contracts.¹⁴ Thus a statute subjecting a homestead to a lien for materials furnished under a prior contract is valid.¹⁵

§1776. Change in law of notice.

A statute providing for notice where there was none before,¹ or lengthening the period for which notice must be given, affects the remedy only and hence may apply to prior contracts. Thus a statute passed after a tax sale, requiring the vendee to give notice to the owner or occupant of the land at least sixty days before the end of the three year period fixed by law for redemption has been held valid.² A period of ninety-one days for compliance with the statute was held a reasonable period of time.³ So a statute dispensing with notice does not impair the obligation of contracts.⁴

§1777. Change in redemption laws.

A statute which authorizes the redemption of property, sold on execution or foreclosure in satisfaction of a former contract, where such right of redemption did not exist before,¹ or which extends the time allowed for such redemption,² impairs the

¹⁴ *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641; 22 Pac. 860; *Leak v. Gay*, 107 N. C. 468, 482; 12 S. E. 312, 315.

¹⁵ *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641; 22 Pac. 860.

¹ *Curtis v. Whitney*, 13 Wall. (U. S.) 68.

² *Coulter v. Stafford*, 56 Fed. 564; 6 C. C. A. 18; *Herrick v. Niesz*, 16 Wash. 74; 47 Pac. 414.

³ *Coulter v. Stafford*, 56 Fed. 564; 6 C. C. A. 18.

⁴ *McKennon v. State*, 42 Tex. Cr. Rep. 371; 96 Am. St. Rep. 802; 60 S. W. 41.

¹ Foreclosure. *Barnitz v. Beverly*, 163 U. S. 118.

² Foreclosure. *Barnitz v. Beverly*, 163 U. S. 118; *Allen v. Allen*, 95 Cal. 184; 16 L. R. A. 646; 30 Pac. 213; *Wilder v. Campbell*, 4 Ida. 695; 43 Pac. 677; *Ogden v. Walters*, 12 Kan. 283; *Bixby v. Bailey*, 11 Kan. 359; *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266; 4 L. R. A. 348; 17 Atl. 405; *Hollister v. Donahoe*, 11 S. D. 407; 78 N. W. 959; *Swinburne v. Mills*, 17 Wash. 611; 61 Am. St. Rep. 932; 50 Pac. 489.

obligation of the contract in satisfaction of which the foreclosure or execution is sought. The same objection applies to a statute increasing the time that must elapse between the rendition of a judgment and a sale of the land.³ While this rule is sanctioned by the Supreme Court of the United States whose views are conclusive on this question, it has not always been acquiesced in by the state courts.⁴ This question has caused some courts a great deal of trouble. In Kansas such statutes were first held unconstitutional,⁵ but, on rehearing, were held to be constitutional.⁶ The judgment last rendered was reversed by the Supreme Court of the United States, which held such statutes unconstitutional.⁷ So in Montana such statutes were at first held to be constitutional,⁸ but on rehearing this judgment was reversed.⁹ The same thing happened in Oregon.¹⁰ If the statute does not increase the period between the time that the suit is begun or the decree is rendered, and the time that the right of redemption expires, a change in the apportionment of time does not impair the obligation of prior contracts. Thus a mortgage was given when the statute provided that property could not be sold on foreclosure until one year after the bill was filed. Before foreclosure the statute was modified so that sale might be had in six months after the bill was filed, and a redemption period of six months after the sale was given. As the total period was not lengthened it was held that the

³ *Swinburne v. Mills*, 17 Wash. 611; 61 Am. St. Rep. 932; 50 Pac. 489.

⁴ *Moore v. Martin*, 38 Cal. 428. Foreclosure. *Anderson v. Anderson*, 129 Ind. 573; 28 Am. St. Rep. 211; 29 N. E. 35.

⁵ *Watkins v. Glenn*, 55 Kan. 417; 40 Pac. 316; *Beverly v. Barnitz*, 55 Kan. 451; 40 Pac. 325.

⁶ *Beverly v. Barnitz*, 55 Kan. 466; 49 Am. St. Rep. 257; 31 L. R. A. 74; 42 Pac. 725.

⁷ *Barnitz v. Beverly*, 163 U. S. 118.

⁸ *State v. Gilliam*, 18 Mont. 94;

31 L. R. A. 721; 44 Pac. 394; 45 Pac. 661; following *Beverly v. Barnitz*, 55 Kan. 466; 49 Am. St. Rep. 257; 31 L. R. A. 74; 42 Pac. 725.

⁹ *State v. Gilliam*, 18 Mont. 109; 33 L. R. A. 556; 45 Pac. 661; 44 Pac. 394; following *Barnitz v. Beverly*, 163 U. S. 118.

¹⁰ *State v. Sears*, 29 Or. 580; 43 Pac. 482. holding such statutes constitutional, was reversed on rehearing; *State v. Sears*, 29 Or. 580; 54 Am. St. Rep. 808; 46 Pac. 785; to follow *Barnitz v. Beverly*, 163 U. S.

118.

new statute did not impair the obligation of the prior contract, but applied to it and controlled it.¹¹ A statute taking away a pre-existing right of redemption is invalid.¹² A change in the terms of redemption, prejudicial to the creditor, impairs the obligation of his contract. Thus a debt was incurred at a time when a judgment debtor or mortgagor could not retain possession after execution sale without accounting for the rents and profits. Subsequently the statute was changed to allow the judgment debtor or mortgagor to keep possession of a homestead during the period of redemption. Such later statute was held unconstitutional as applied to a pre-existing mortgage.¹³ A similar statute has, however, been held to be valid as to a pre-existing debt not a lien on the realty which was subsequently put into judgment, the realty being sold after the statute was passed.¹⁴ This case was decided on the theory that since the property sold for more than the amount of the judgment debt, the rights of the original creditor were discharged, while the rights of the purchaser at the judicial sale did not originate until after the statute had been passed. This ignores the theory that the rights of the judgment creditor or mortgagee pass to the purchaser.¹⁵ On the other hand, a statute reducing the rate of interest to be paid on redemption is valid as to prior debts, bearing by agreement a rate of interest still lower than that fixed by statute.¹⁶ After sale on execution an additional contract right exists, namely, that of the purchaser at such sale. Subsequent statutes cannot change the period of redemption.¹⁷ This is true even if the sale was not based on

¹¹ *State Savings Bank v. Mathews*, 123 Mich. 56; 81 N. W. 918.

¹² *Moore v. Irby*, 69 Ark. 102; 61 S. W. 371. The court refused to decide the question whether a statute reducing the redemption period is valid, in *Spokane County v. Ry.*, 5 Wash. 89; 31 Pac. 420.

¹³ *Canadian, etc., Co. v. Blake*, 24 Wash. 102; 85 Am. St. Rep. 946; 63 Pac. 1100.

¹⁴ *Wilson v. Wold*, 21 Wash. 398; 75 Am. St. Rep. 846; 58 Pac. 223.

¹⁵ *Hillebert v. Porter*, 28 Minn. 496; 11 N. W. 84.

¹⁶ *Robertson v. Van Cleave*, 129 Ind. 217; 15 L. R. A. 68; 29 N. E. 781; 26 N. E. 899.

¹⁷ *Thresher v. Atchison*, 117 Cal. 73; 59 Am. St. Rep. 159; 48 Pac. 1020; *Hull v. State*, 29 Fla. 79; 30 Am. St. Rep. 95; 16 L. R. A. 308; 11 So. 97.

contract rights, such as a tax sale.¹⁸ However, in analogy to the rule controlling statutes of limitations, a subsequent statute may require deeds for lands sold for taxes to be made within a specified time after the sale, and if a reasonable time is given for obtaining such deeds after the passage of the statute, it will be valid.¹⁹ A statute requiring a purchaser at a foreclosure sale to take a deed within five years of the end of the period of redemption and providing that if the deed is not taken within such time, the certificate of purchase shall be void does not impair the obligation of a trust deed executed before the statute was passed, though when the deed was executed there was no limit as to the period within which the deed must be obtained.²⁰ So a statute subsequent to the tax-sale but before a deed issues may require notice to be given to the original owner as a condition precedent to taking possession of the property thus sold.²¹ The rate of interest to be paid on redemption cannot be changed to the prejudice of a purchaser at a prior judicial sale.²²

¹⁸ *Hull v. State*, 29 Fla. 79; 30 Am. St. Rep. 95; 16 L. R. A. 308; 11 So. 97.

¹⁹ *Tuttle v. Block*, 104 Cal. 443; 38 Pac. 109.

²⁰ *Bradley v. Lightcap*, 201 Ill. 511; 66 N. E. 546. (Even though

the payee of the note secured by the trust-deed was the purchaser.)

²¹ *Oullahan v. Sweeney*, 79 Cal. 537; 12 Am. St. Rep. 172; 21 Pac. 960; *Gage v. Stewart*, 127 Ill. 207; 11 Am. St. Rep. 116; 19 N. E. 702.

²² *Bauer Grocer Co. v. Zelle*, 172 Ill. 407; 50 N. E. 238.

CHAPTER LXXXII.

STATUTORY PROHIBITION OF SUBSEQUENT CONTRACTS.

§1778. Constitutional right to contract.

The clause of the Constitution protecting the obligation of contracts from impairment does not apply to contracts made after the passage of the law affecting them.¹ Other provisions of the Constitution, however, limit the power of the legislature over contracts thereafter made. The right to contract is secured by constitutional provisions protecting property² and liberty.³ The legislature has nevertheless an undoubted and wide range of power in making future contracts illegal or void. Illustrations of specific statutes which are held valid have already been discussed in connection with illegal and void contracts. In the present chapter we will pass by those already discussed and consider other forms of statutes about which there has been a greater variance of judicial opinion.

The very nature of the power of the legislature to control and prohibit future contracts is in dispute. This power is at least as wide as the police power, and has been assumed to be the same thing.⁴ The difficulty of giving an exact legal defini-

¹ See §§ 1759, 1760.

² *In re Preston*, 63 O. S. 428; 81 Am. St. Rep. 642; 59 N. E. 101; *Palmer & Crawford v. Tingle*, 55 O. S. 423; 45 N. E. 313. "The right to acquire and possess property necessarily includes the right to contract." *Leep v. Ry.*, 58 Ark. 407, 415; 41 Am. St. Rep. 109; 23 L. R. A. 264; 25 S. W. 75; quoted in *Dugger v. Ins. Co.*, 95 Tenn. 245, 252; 28 L. R. A. 796; 32 S. W. 5.

³ *Allgeyer v. Louisiana*, 165 U. S. 578; *Leep v. Ry.*, 58 Ark. 407; 41 Am. St. Rep. 109; 23 L. R. A. 264; 25 S. W. 75; *Gillespie v. People*, 188 Ill. 176; 80 Am. St. Rep. 176; 52 L. R. A. 283; 58 N. E. 1007; *State v. Loomis*, 115 Mo. 307; 21 L. R. A. 789; 22 S. W. 350.

⁴ *State v. Dalton*, 22 R. I. 77; 84 Am. St. Rep. 818; 48 L. R. A. 775; 46 Atl. 234.

tion of the police power has been noted frequently.⁵ With the exact nature of the police power in doubt, and with a further doubt as to whether the power of the legislature to prohibit future contracts is any wider than the police power, it follows that it is practically impossible to lay down in advance rules which will determine whether the legislature possesses this power in reference to specific types of contract. A discussion of the validity of specific statutes, to be next undertaken, will show a conflict of authority upon the questions of the validity of the particular types of statutes — a conflict which increases the difficulty of laying down abstract rules even beyond that arising from the nature of the subject.

§1779. Statutes restricting hours of labor.

Statutes restricting the number of hours per day or per week for which persons may contract to work are not uncommon. The validity of such statutes depends in the first instance on whether the contract is with a private person for private purposes, or whether it is with a public corporation, or with a contractor for working for a public corporation. Statutes which restrict the number of hours per day for which persons may contract to labor with private persons for private purposes¹ making a violation of such statute a crime,² or providing

⁵ "It would be presumptuous for any court to attempt to formulate an exact legal definition of the term 'police power of the state.' . . . But for all practical purposes the police power of the state may be shortly defined to be the power of the legislature to make such regulations relating to the personal and property rights as look to the public health, the public safety, and the public morals." *State v. Dalton*, 22 R. I. 77, 80; 84 Am. St. Rep. 818; 48 L. R. A. 775; 46 Atl. 234.

¹ *Ex parte Kuback*, 85 Cal. 274; 20 Am. St. Rep. 226; 9 L. R. A. 482;

24 Pac. 737; *In re Morgan*, 26 Colo. 415; 77 Am. St. Rep. 269; 47 L. R. A. 52; 58 Pac. 1071; *In re Eight Hours Bill*, 21 Colo. 29; 39 Pac. 328; *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; 29 L. R. A. 79; 40 N. E. 454; *Low v. Printing Co.*, 41 Neb. 127; 43 Am. St. Rep. 670; 24 L. R. A. 702; 59 N. W. 362; *Wheeling, etc., Ry. v. Gilmore*, 8 Ohio C. C. 658.

² *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; 29 L. R. A. 79; 40 N. E. 454; *Low v. Printing Co.*, 41 Neb. 127; 43 Am. St. Rep. 670; 24 L. R. A. 702; 59 N. W. 362.

that the employer shall pay double wages for work overtime,³ have been generally held unconstitutional. Even a statute forbidding women employed in factories to work more than eight hours a day has been held invalid.⁴ In some cases the reason for holding such a statute invalid is that it "violates the right of parties to make their own contracts — a right guaranteed by our bill of rights,"⁵ or that it deprives the employe of a property right.⁶ There have often been special reasons, quite apart from these, for holding such contracts invalid. Thus such statutes often discriminate unfairly against certain classes of employers or employes, as where they apply only to certain kinds of factories,⁷ or as to only workmen in underground mines and smelters,⁸ or as to all laborers except farm laborers and domestic servants,⁹ or as to women.¹⁰ Under the constitutions of some states, statutes restricting the hours of labor to eight have been upheld.¹¹ The Utah statute applied to laborers in underground mines and smelters.¹² So a restriction of the

³ *Low v. Printing Co.*, 41 Neb. 127; 43 Am. St. Rep. 670; 24 L. R. A. 702; 59 N. W. 362.

⁴ *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; 29 L. R. A. 79; 40 N. E. 454.

⁵ *In re Eight Hours Bill*, 21 Colo. 29, 32; 39 Pac. 328. So *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; 29 L. R. A. 79; 40 N. E. 454.

⁶ *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; 29 L. R. A. 79; 40 N. E. 454.

⁷ *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; 29 L. R. A. 79; 40 N. E. 454.

⁸ *In re Morgan*, 26 Colo. 415; 77 Am. St. Rep. 269; 47 L. R. A. 52; 58 Pac. 1071.

⁹ *Low v. Printing Co.*, 41 Neb. 127; 43 Am. St. Rep. 670; 24 L. R. A. 702; 59 N. W. 362.

¹⁰ *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; 29 L. R. A. 79; 40 N. E. 454.

¹¹ *Holden v. Hardy*, 169 U. S. 366 (under the constitution of Utah, affirming *State v. Holden*, 14 Utah 96; 37 L. R. A. 108; 46 Pac. 1105; and *State v. Holden*, 14 Utah 71; 46 Pac. 756; *sub nomine*, *Holden v. Hardy*, 37 L. R. A. 103); *In re Dalton*, 61 Kan. 257; 47 L. R. A. 380; 59 Pac. 336; Opinion of the Justices, 163 Mass. 589; *sub nom.*, *In re House Bill 1230*; 28 L. R. A. 344; 40 N. E. 713; *State v. Mfg. Co.*, 120 Mass. 383; *State v. Holden*, 14 Utah 96; 37 L. R. A. 108; 46 Pac. 1105.

¹² *Holden v. Hardy*, 169 U. S. 366 (affirming *State v. Holden*, 14 Utah 71; 46 Pac. 756; *sub nomine*, *Holden v. Hardy*, 37 L. R. A. 103; and *State v. Holden*, 14 Utah 96; 37 L. R. A. 108; 46 Pac. 1105); *Short v. Mining Co.*, 20 Utah 20; 45 L. R. A. 603; 57 Pac. 720. A similar act was held valid in Nevada. *In re Boyce*, — Nev. —; 75 Pac. 1.

hours of labor for bakers to sixty hours a week,¹³ or for employes of a public service corporation to ten hours out of the twenty-four, to be employed within twelve consecutive hours,¹⁴ have each been held valid. Statutes limiting the hours for which women may be employed in any "mechanical or mercantile establishment, laundry, hotel or restaurant,"¹⁵ to ten hours a day,¹⁶ or to sixty hours a week and not over ten hours a day,¹⁷ have been held valid. Statutes restricting the hours of labor of persons employed by or on behalf of the public have been held valid.¹⁸ This holding is based on the theory "that the work, being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done."¹⁹ Other courts have reached an opposite conclusion as to statutes limiting the number of hours of labor by persons employed by or on behalf of the public, and requiring such stipulations to be inserted in contracts with public contractors,²⁰ or providing that a public contractor who violates such provision shall forfeit his contract,²¹ especially if the statute requires the wages to be not less than those prevailing for a legal day's work.²² Even if such provision has been incorporated in a contract between a city and a public contractor it has been held that it cannot be

¹³ *People v. Lochner*, 177 N. Y. 145; 69 N. E. 373.

¹⁴ *Opinion to the Governor (In re Ten-Hour Law)*, 24 R. I. 603; 61 L. R. A. 612; 54 Atl. 602 (applying to employes of a street railway).

¹⁵ *State v. Buchanan*, 29 Wash. 602; 92 Am. St. Rep. 930; 59 L. R. A. 342; 70 Pac. 52.

¹⁶ *State v. Buchanan*, 29 Wash. 602; 92 Am. St. Rep. 930; 59 L. R. A. 342; 70 Pac. 52.

¹⁷ *Wenhan v. State*, 65 Neb. 394; 58 L. R. A. 825; 91 N. W. 421.

¹⁸ *Atkin v. Kansas*, 191 U. S. 207 (affirming *State v. Atkin*, 64 Kan.

174; 97 Am. St. Rep. 343; 67 Pac. 519, which followed *In re Dalton*, 61 Kan. 257; 47 L. R. A. 380; 59 Pac. 336).

¹⁹ *Atkin v. Kansas*, 191 U. S. 207 (224).

²⁰ *Cleveland v. Construction Co.*, 67 O. S. 197; 93 Am. St. Rep. 670; 59 L. R. A. 775; 65 N. E. 885; *Seattle v. Smyth*, 22 Wash. 327; 79 Am. St. Rep. 939; 60 Pac. 1120.

²¹ *Fiske v. People*, 188 Ill. 206; 52 L. R. A. 291; 58 N. E. 985.

²² *People v. Coler*, 166 N. Y. 1; 82 Am. St. Rep. 605; 52 L. R. A. 814; 59 N. E. 716.

enforced,²³ though if the bids are made and the contract awarded after the decision of the court of last resort declaring the law unconstitutional has been pronounced, and the city has given notice that it will not enforce such provision, it must be presumed that the contract price was not increased by reason of such provision, and hence the awarding of such contract should not be set aside.²⁴ A statute intended to abolish sweatshops and the like, which forbade the manufacture of cigars in tenement houses containing more than three families, was held unconstitutional.²⁵ A statute requiring a city to employ only citizens of the United States or persons who have made formal declaration of their intention to become citizens is invalid.²⁶

§1780. Statutes concerning rate and method of payment of wages.

Statutes regulating the method in which employes are to be paid, providing that they must be paid in money,¹ or if paid in scrip or in orders on stores for goods, that such orders must be redeemed in cash,² have generally been held valid. These

²³ *People v. Coler*, 166 N. Y. 1; 82 Am. St. Rep. 605; 52 L. R. A. 814; 59 N. E. 716. (Breach consisted in not paying the contract rate of wages.) *Cleveland v. Construction Co.*, 67 O. S. 197; 93 Am. St. Rep. 670; 59 L. R. A. 775; 65 N. E. 885. (Breach consisted in requiring work overtime.)

²⁴ *People v. Featherstonhaugh*, 172 N. Y. 112; 60 L. R. A. 768; 64 N. E. 802.

²⁵ *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636.

²⁶ (City of) *Chicago v. Hulbert*, 205 Ill. 346; 68 N. E. 786.

¹ *Skinner v. Mining Co.*, 96 Fed. 735; *Hancock v. Yaden*, 121 Ind. 366; 16 Am. St. Rep. 396; 6 L. R. A. 576; 23 N. E. 253; *Shaffer v. Mining Co.*, 55 Md. 74; *State v. Coal Co.*, 36 W. Va. 802; 17 L. R. A. 385; 15 S. E. 1000. (Judgment of lower court affirmed by an evenly

divided court.) *Contra*, *State v. Haun*, 61 Kan. 146; 47 L. R. A. 369; 59 Pac. 340; *State v. Loomis*, 115 Mo. 307; 21 L. R. A. 789; 22 S. W. 350; *Godcharles v. Wigeman*, 113 Pa. St. 431; 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179; 25 Am. St. Rep. 863; 6 L. R. A. 621; 10 S. E. 285; *State v. Coke Co.*, 33 W. Va. 188; 25 Am. St. Rep. 891; 6 L. R. A. 359; 10 S. E. 288.

² *Knoxville Iron Co. v. Harbison*, 183 U. S. 13 (affirming *Harbison v. Iron Co.*, 103 Tenn. 421; 76 Am. St. Rep. 682; 56 L. R. A. 316; 53 S. W. 955); *State v. Peel Splint Coal Co.*, 36 W. Va. 802; 17 L. R. A. 385; 15 S. E. 1000 (affirmed by an equally divided court). *Contra*, *Frorer v. People*, 141 Ill. 171; 16 L. R. A. 492; 31 N. E. 395; *State v. Loomis*, 115 Mo. 307; 21 L. R. A. 789; 22 S. W. 350; *State v. Goodwill*, 33 W. Va. 179; 25 Am. St.

statutes are generally in terms applicable only to manufacturing or mining concerns, and on that account are sometimes held invalid for unreasonable discrimination,³ as where applicable only to merchants on the one hand and coal miners on the other.⁴ Statutes providing that if employes in coal mines are paid in proportion to the amount of coal mined, the amount of coal mined must be determined in a certain specified manner,⁵ as where the coal is to be weighed before it is screened,⁶ or is to be weighed at the mines in the miners' cars,⁷ are generally held invalid. Some decisions turn on unreasonable discrimination in the statutes, as where such provision applies only to coal to be shipped away and not to coal to be sold at the mine.⁸ In other jurisdictions such statutes are held valid,⁹ at least as to corporations.¹⁰ Statutes providing that on discharge of an employe of a railway company he must be paid all wages owing to him, even if not then due by the terms of his contract of employment, without any deduction on account of

Rep. 863; 6 L. R. A. 621; 10 S. E. 285. So a statute forbidding a person, firm or corporation engaged in mining and manufacturing, and interested in merchandising, knowingly and wilfully to sell supplies to any employe at a greater profit than when selling supplies of like quality, character and quantity to other customers buying for cash, has been held to be unconstitutional. *State v. Coke Co.*, 33 W. Va. 188; 25 Am. St. Rep. 891; 6 L. R. A. 359; 10 S. E. 288.

³ *State v. Loomis*, 115 Mo. 307; 21 L. R. A. 789; 22 S. W. 350.

⁴ *Dixon v. Poe*, 159 Ind. 492; 95 Am. St. Rep. 309; 60 L. R. A. 308; 65 N. E. 518.

⁵ *Harding v. People*, 160 Ill. 459; 52 Am. St. Rep. 344; 32 L. R. A. 445; 43 N. E. 624; *Ramsey v. People*, 142 Ill. 380; 17 L. R. A. 853; 32 N. E. 364; *Millett v. People*, 117

Ill. 294; 57 Am. Rep. 869; 7 N. E. 631.

⁶ *In re House Bill 203*, 21 Colo. 27; 39 Pac. 431; *Ramsey v. People*, 142 Ill. 380; 17 L. R. A. 853; 32 N. E. 364; *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869; 7 N. E. 631; *In re Preston*, 63 O. S. 428; 81 Am. St. Rep. 642; 52 L. R. A. 523; 59 N. E. 101.

⁷ *Harding v. People*, 160 Ill. 459; 52 Am. St. Rep. 344; 32 L. R. A. 445; 43 N. E. 624.

⁸ *Harding v. People*, 160 Ill. 459; 52 Am. St. Rep. 344; 32 L. R. A. 445; 43 N. E. 624.

⁹ *State v. Wilson*, 61 Kan. 32; 47 L. R. A. 71; 58 Pac. 981; affirming 7 Kan. App. 428; 53 Pac. 371; *State v. Coal Co.*, 36 W. Va. 802; 17 L. R. A. 385; 15 S. E. 1000 (decided by an evenly divided court).

¹⁰ *Woodson v. State*, 69 Ark. 521; 65 S. W. 465.

such payment in advance have been held valid.¹¹ It has been held that such statute is valid as applying to corporation in view of the power of the state over corporations, although it might not be valid as applied to natural persons.¹² Statutes forbidding deductions from wages of employes except for certain specified purposes are generally held invalid.¹³ A statute providing that the employer of persons engaged in weaving cannot hold back wages for defects in work is invalid.¹⁴ Statutes fixing the rate of wages for laborers employed by the state are valid,¹⁵ but statutes fixing the rate of wages to be paid by public contractors, providing that public contracts shall be void unless the contractor agrees to pay a certain wage, are invalid.¹⁶ Statutes regulating the time at which wages must be paid are generally held to be invalid,¹⁷ but some of these statutes are held invalid because they apply to corporations only,¹⁸ or to certain classes of corporations.¹⁹ On the other hand, statutes of this type have been held valid,²⁰ even if religious, literary and charitable societies are excepted from its operation.²¹ A federal statute forbidding payment of wages to a seaman in advance, making such payment a misdemeanor, and providing

¹¹ *St. Louis, etc., Ry. v. Paul*, 64 Ark. 83; 62 Am. St. Rep. 154; 37 L. R. A. 504; 40 S. W. 705; *Leep v. Ry.*, 58 Ark. 407; 41 Am. St. Rep. 109; 25 L. R. A. 264; 25 S. W. 75.

¹² *Leep v. Ry.*, 58 Ark. 407; 41 Am. St. Rep. 109; 23 L. R. A. 264; 25 S. W. 75.

¹³ *Kellyville Coal Co. v. Harrier*, 207 Ill. 624; 69 N. E. 927.

¹⁴ *Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533; 14 L. R. A. 325; 28 N. E. 1126.

¹⁵ *Clark v. State*, 142 N. Y. 101; 36 N. E. 817.

¹⁶ *Street v. Supply Co.*, 160 Ind. 338; 98 Am. St. Rep. 325; 66 N. E. 895; *People v. Coler*, 166 N. Y. 1; 82 Am. St. Rep. 605; 52 L. R. A. 814; 59 N. E. 716.

¹⁷ *Leep v. Ry.*, 58 Ark. 407; 41

Am. St. Rep. 109; 23 L. R. A. 264; 25 S. W. 75; *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206; 22 L. R. A. 340; 35 N. E. 62; *Republic, etc., Co. v. State*, 160 Ind. 379; 62 L. R. A. 136; 66 N. E. 1005.

¹⁸ *Johnson v. Mining Co.*, 127 Cal. 4; 78 Am. St. Rep. 17; 59 Pac. 304.

¹⁹ *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206; 22 L. R. A. 340; 35 N. E. 62.

²⁰ *International Text-Book Co. v. Weissinger*, 160 Ind. 349; 98 Am. St. Rep. 334; 65 N. E. 521; *Opinion of the Justices, etc.*, 163 Mass. 589; *sub nom., In re House Bill 1230*, 28 L. R. A. 344; 40 N. E. 713.

²¹ *State v. Mfg. Co.*, 18 R. I. 16; 17 L. R. A. 856; 25 Atl. 246.

that such payment shall not absolve the vessel or its master from full payment of wages actually earned is constitutional.²² Thus a statute forbidding the assignment by an employe of wages to become due and making invalid any agreement whereby an employer is relieved from paying to his employe his full wages weekly, has been held valid.²³

§1781. Statutes protectong union labor.

Statutes forbidding the discharge or non-employment of an employe because he is a member of a union are invalid.¹ Statutes requiring goods made in penal institutions to be marked with a "convict label,"² or providing that goods can be marked with a "union label" only with the consent of such union,³ are valid. An ordinance which requires all city print-

²² Patterson v. The Eudora, 190 U. S. 169.

²³ International Text-Book Co. v. Weissinger, 160 Ind. 349; 98 Am. St. Rep. 334; 65 N. E. 521.

¹ Gillespie v. People, 188 Ill. 176; 80 Am. St. Rep. 176; 52 L. R. A. 283; 58 N. E. 1007; State v. Julow, 129 Mo. 163; 50 Am. St. Rep. 443; 29 L. R. A. 257; 31 S. W. 781; State v. Kreutzberg, 114 Wis. 530; 91 Am. St. Rep. 934; 90 N. W. 1098. "Here a non-trade union man or non-labor union man could be discharged without ceremony, without let or hindrance, whenever the employer so desired, with or without reason therefor, while in the case of a trade union or labor union man he could not be discharged if such discharge rested on the ground of his being a member of such an organization. In other words, the legislature have undertaken to limit the power of the owner or employer as to his right to contract with, or to terminate a contract with, particular persons of a class, and therefore the statute which does this is a special,

and not a general, law, and, therefore, violative of the Constitution." State v. Julow, 129 Mo. 163, 176; 50 Am. St. Rep. 443; 29 L. R. A. 257; 31 S. W. 781; quoted in Gillespie v. People, 188 Ill. 176, 186; 80 Am. St. Rep. 176; 52 L. R. A. 283; 58 N. E. 1007. "The legislature cannot prevent persons who are *sui juris* from laboring, or from making such contracts as they may see fit to make relative to their own lawful labor; nor has it any power by penal laws to prevent any person, with or without cause, from refusing to employ another or to terminate a contract with him, subject only to the liability to respond in a civil action for an unwarranted refusal to do that which has been agreed upon." Gillespie v. People, 188 Ill. 176, 185; 80 Am. St. Rep. 176; 52 L. R. A. 283; 58 N. E. 1007.

² People v. Hawkins, 157 N. Y. 1; 68 Am. St. Rep. 736; 42 L. R. A. 490; 51 N. E. 257.

³ State v. Bishop, 128 Mo. 373; 49 Am. St. Rep. 569; 29 L. R. A.

ing to bear the union label is invalid.⁴ Statutes providing that no stone can be used on any municipal work unless it is cut and dressed within the state are invalid.⁵ A statute providing for a free employment agency at public expense and forbidding those in charge to furnish names of applicants for service to employers whose employees are on a strike, though such names must be furnished to other employers is invalid.⁶

§1782. Statutes concerning liens.

Statutes providing that mechanic's liens shall have priority over mortgages prior in time, are generally held valid as to mortgages executed after the passage of such act.¹ Subcontractors' liens are of two kinds. Some statutes, the subrogation lien acts, give him a lien upon the realty on which the work is done but limit his recovery to the amount due under the contract from the owner of the realty to the main contractor. Statutes giving liens of this class are valid, and there is little dispute on this question. The others, known as direct lien acts, give him a lien upon the realty for the amount due him from the main contractor, irrespective of the state of accounts under the contract between the owner of the realty and the main contractor. As to the constitutionality of such statutes there is a difference of opinion, some courts holding them valid,²

200; 31 S. W. 9; Perkins v. Heert, 158 N. Y. 306; 70 Am. St. Rep. 483; 43 L. R. A. 858; 53 N. E. 18.

⁴ Marshall & Bruce Co. v. Nashville, 109 Tenn. 495; 71 S. W. 815.

⁵ People v. Coler, 166 N. Y. 144; 59 N. E. 776.

⁶ Mathews v. People, 202 Ill. 389; 95 Am. St. Rep. 241; 63 L. R. A. 73; 67 N. E. 28.

¹ Wimberley v. Mayberry, 94 Ala. 240; 14 L. R. A. 305; 10 So. 157; Smith v. Moore, 26 Ill. 392; Stockwell v. Carpenter, 27 Ia. 119; Montgomery v. Allen, 107 Ky. 298; 53 S. W. 813; Crandall v. Cooper, 62 Mo. 478. *Contra*, Meyer v. Ber-

landi, 39 Minn. 438; 12 Am. St. Rep. 663; 1 L. R. A. 777; 40 N. W. 513. (Even where the lien was claimed only on the building erected after the mortgage was given.)

² Great Southern, etc., Co. v. Jones, 193 U. S. 532 (affirming 116 Fed. 793; 54 C. C. A. 165, which was a decree rendered after the reversal (on the ground that the record did not show diverse citizenship) in 177 U. S. 449, of Jones v. Hotel Co., 86 Fed. 370; 30 C. C. A. 108, which in turn reversed 79 Fed. 477); Chicago Lumber Co. v. Newcomb, — Colo. App. —; 74 Pac. 786; Paine v. Tillinghast, 52 Conn.

while a minority hold them invalid.³ A statute requiring a bond to pay subcontractors to be filed with the contract, and making the owner personally liable if no bond is filed, has been held invalid.⁴ A statute requiring those who contract about erecting buildings to give bonds for performance of such contracts, which bonds shall enure to the benefit of all who furnish materials is unconstitutional.⁵ A statute providing that the purchaser of property encumbered by a statutory lien who sells such property so that such lien cannot be enforced, shall be personally liable for the entire debt secured by such lien is invalid.⁶ A statute providing that the purchaser of logs subject to loggers' liens is not a *bona fide* purchaser unless he has paid full value and has seen the purchase money applied to the payment of such liens is valid.⁷ So a statute providing that a sale of a stock of goods in bulk shall be deemed fraudulent unless the vendee requires and receives from the vendor a verified statement of the vendor's creditors, and sees that the purchase money is applied to such debts is valid.⁸

532; *Barrett v. Millikan*, 156 Ind. 510; 83 Am. St. Rep. 220; 60 N. E. 310; *Smith v. Newbaur*, 144 Ind. 95; 33 L. R. A. 685; 42 N. E. 40; affirmed on rehearing, 33 L. R. A. 687; 42 N. E. 1094; *Hightower v. Bailey*, 108 Ky. 198; 94 Am. St. Rep. 350; 49 L. R. A. 255; 56 S. W. 147; *McKeon v. Supply Co.*, 51 La. Ann. 1961; *Treusch v. Shryock*, 51 Md. 162; *Bowen v. Phinney*, 162 Mass. 593; *Bardwell v. Mann*, 46 Minn. 285; 48 N. W. 1120; *Laird v. Moonan*, 32 Minn. 358; 20 N. W. 354; *Smalley v. Gearing*, 121 Mich. 190; *Henry, etc., Co. v. Evans*, 97 Mo. 47; *Calpetzer v. Church*, 24 Neb. 113; 37 N. W. 931; *Glacius v. Black*, 67 N. Y. 563; *Blauvelt v. Woodworth*, 31 N. Y. 285; *Title Guarantee Co. v. Wrenn*, 35 Or. 62; 76 Am. St. Rep. 454; 56 Pac. 271; *Gurney v. Walsham*, 16 R. I. 698; *Albright v. Smith*, 3 S. D. 631; 54

N. W. 816; s. c., 2 S. D. 577; 51 N. W. 590; *Cole Mfg. Co. v. Falls*, 90 Tenn. 466; *Roanoke, etc., Co. v. Karn*, 80 Va. 589; *Mallory v. Abattoir Co.*, 80 Wis. 170; 49 N. W. 1071.

³ *Palmer v. Tingle*, 55 O. S. 423; 45 N. E. 313.

⁴ *Shaughnessey v. Surety Co.*, 138 Cal. 543; 69 Pac. 250; 71 Pac. 701; *Gibbs v. Tally*, 133 Cal. 373; 60 L. R. A. 815; 65 Pac. 970.

⁵ *Snell v. Bradbury*, 139 Cal. 379; 73 Pac. 150; *San Francisco Lumber Co. v. Bibb*, 139 Cal. 192; 72 Pac. 964.

⁶ *Rogers-Rugers Co. v. Murray*, 115 Wis. 267; 95 Am. St. Rep. 901; 59 L. R. A. 737; 91 N. W. 657.

⁷ *McCoy v. Cook*, 13 Wash. 158; 42 Pac. 546.

⁸ *McDaniels v. Shoe Co.*, 30 Wash. 549; 94 Am. St. Rep. 889; 60 L. R. A. 947; 71 Pac. 37.

§1783. Statutes concerning common carriers.

The legislature may fix rates for transportation by rail,¹ or for grain elevators,² if reasonable. A commission fixing railroad rates must, however, give a hearing to such railroad company before fixing such rates.³ If such rates are unreasonable, as where they are less than the cost of such service,⁴ such statutes are, in effect, a taking of private property without due process of law, and are invalid. A statute which makes a common carrier⁵ or a telegraph company⁶ liable for its own negligence or that of its employes in spite of its contract to the contrary, is valid. A statute which makes the initial carrier liable for the negligence of connecting carriers in spite of its contract to the contrary is invalid.⁷ A statute providing that in case of loss a common carrier shall be liable for the amount of damages which it causes, less insurance, and that the insurance company shall have no right of subrogation is valid.⁸ A statute which requires a common carrier to turn over to a storage company or to a public warehouse all property not called for, for twenty days, is unconstitutional.⁹ A statute that makes a bill of lading conclusive evidence of the amount of grain shipped is unconstitutional.¹⁰

¹ Chicago, etc., Ry. v. Wellman, 143 U. S. 339; Chicago, etc., Ry. v. Minnesota, 134 U. S. 418; Wabash, etc., Ry. v. Illinois, 118 U. S. 557; Chicago, etc., Ry. v. Iowa, 94 U. S. 155; Peik v. Ry., 94 U. S. 164.

² Budd v. New York, 143 U. S. 517; People v. Budd, 117 N. Y. 1; 15 Am. St. Rep. 460; 5 L. R. A. 559; 22 N. E. 670; State v. Brass, 2 N. D. 482; 52 N. W. 408.

³ Chicago, etc., Ry. v. Commissioners, 134 U. S. 418.

⁴ Commonwealth v. Bridge Co. (Ky.), 21 S. W. 1042.

⁵ Tuller v. Ry. Co., 175 U. S. 348.

⁶ Kemp v. Telegraph Co., 28 Neb. 661; 26 Am. St. Rep. 363; 44 N. W. 1064; Burgess v. Telegraph Co., 92 Tex. 125; 71 Am. St. Rep. 833; 46 S. W. 794.

⁷ McCann v. Eddy, 133 Mo. 59; 35 L. R. A. 110; 27 S. W. 541.

⁸ Leavitt v. Ry., 90 Me. 153; 38 L. R. A. 152; 37 Atl. 886.

⁹ State v. Ry., 68 Minn. 381; 64 Am. St. Rep. 482; 38 L. R. A. 672; 71 N. W. 400.

¹⁰ Missouri, etc., R. R. v. Simonson, 64 Kan. 802; 91 Am. St. Rep. 248; 35 L. R. A. 765; 68 Pac. 653.

§1784. Statutes concerning sales.

Statutes forbidding the sale of railroad tickets by any except duly authorized agents of the railroad are generally held valid,¹ and so are statutes or ordinances forbidding the sale of transfers issued by a street railway company.² However, the addition of a provision that such law should apply only if notice was given on the face of the ticket, which notice the railway company had the right to omit, was held to invalidate such statute, though valid otherwise.³ Statutes forbidding the defacing of any mark on bottles, or selling bottles unless they have been purchased by the vendor, are held valid.⁴ Statutes forbidding department stores,⁵ or forbidding a vendor of goods to give an order on a third person with the articles sold by him,⁶ such as what are familiarly known as "trading stamps"⁷ or forbidding a vendor of goods to give premiums to purchasers at his store and making such act a crime,⁸ have been held invalid; except where the stamp is in the nature of a lottery entitling the purchaser to something indeterminate at the time, to be selected afterwards

¹ *Burdick v. People*, 149 Ill. 600; 41 Am. St. Rep. 329; 24 L. R. A. 152; 36 N. E. 948; *Fry v. State*, 63 Ind. 552; 30 Am. Rep. 238; *State v. Corbett*, 57 Minn. 345; 24 L. R. A. 498; 59 N. W. 317; *State v. Bernheim*, 19 Mont. 512; 49 Pac. 441; *Commonwealth v. Keary*, 198 Pa. St. 500; 48 Atl. 472; *Jannin v. State*, 42 Tex. Cr. Rep. 631; 96 Am. St. Rep. 821; 53 L. R. A. 349; 51 S. W. 1126; 62 S. W. 419. *Contra*, *People v. Warden*, 157 N. Y. 116; 68 Am. St. Rep. 763; 43 L. R. A. 264; 51 N. E. 1006.

² *Ex parte Lorenzen*, 128 Cal. 431; 79 Am. St. Rep. 47; 50 L. R. A. 55; 61 Pac. 68.

³ *Jannin v. State*, 42 Tex. Cr. Rep. 631; 96 Am. St. Rep. 821; 53 L. R. A. 349; 51 S. W. 1126; 62 S. W. 419. Such a statute has been held invalid as special legislation. *Horwich v. Laboratory*

Co., 205 Ill. 497; 68 N. E. 938.

⁴ *People v. Cannon*, 139 N. Y. 32, 645; 36 Am. St. Rep. 668; 34 N. E. 759, 1098.

⁵ *Chicago v. Netcher*, 183 Ill. 104; 75 Am. St. Rep. 93; 48 L. R. A. 261; 55 N. E. 707. So a statute imposing a license fee on department stores only is invalid. *State v. Ashbrook*, 154 Mo. 375; 77 Am. St. Rep. 765; 55 S. W. 627.

⁶ *State v. Dalton*, 22 R. I. 77; 84 Am. St. Rep. 818; 48 L. R. A. 775; 46 Atl. 234.

⁷ *State v. Hawkins*, 95 Md. 133; 93 Am. St. Rep. 328; 51 Atl. 850; *State v. Dalton*, 22 R. I. 77; 84 Am. St. Rep. 818; 48 L. R. A. 775; 46 Atl. 234; *State v. Dodge*, — Vt. —; 56 Atl. 983; *Young v. Commonwealth*, 101 Va. 853; 45 S. E. 327.

⁸ *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465; 17 N. E. 343.

by lot.⁹ Statutes requiring the ingredients of baking powder to be shown by the label,¹⁰ or forbidding the manufacture or sale of baking powder containing alum,¹¹ are valid. Statutes which prohibit the sale of articles of food, such as vinegar,¹² or oleomargarine,¹³ which contain artificial coloring matter; or which require oleomargarine to be colored pink,¹⁴ have been held valid. A State may totally forbid the manufacture and sale of oleomargarine within its own limits,¹⁵ but cannot prevent its importation from other states.¹⁶ While a state may prevent oleomargarine colored yellow in imitation of butter from being imported,¹⁷ it cannot prevent its importation except when colored pink,¹⁸ since this involves the power to exclude it entirely in practice. Statutes forbidding any sales of shares of corporate stock "on margin" are valid.¹⁹ Statutes requiring notes given for patent rights so to state on their face are valid.²⁰ Statutes providing that a sale of a stock of goods in bulk shall be presumed fraudulent unless accompanied with certain precautions, such as furnishing a list of creditors of the business, and requiring the vendee to see to the application of the purchase money to their debts are generally held valid.²¹

⁹ State v. Hawkins, 95 Md. 133; 93 Am. St. Rep. 328; 51 Atl. 850.

¹⁰ State v. Sherod, 80 Minn. 446; 81 Am. St. Rep. 268; 50 L. R. A. 660; 83 N. W. 417.

¹¹ State v. Layton, 160 Mo. 474; 62 L. R. A. 163; 61 S. W. 171; affirmed Layton v. Missouri, 187 U. S. 356.

¹² People v. Girard, 145 N. Y. 105; 45 Am. St. Rep. 595; 39 N. E. 823.

¹³ Plumely v. Massachusetts, 155 U. S. 462; Cook v. State, 110 Ala. 40; 20 So. 360; Butler v. Chambers, 36 Minn. 69; 1 Am. St. Rep. 638; 30 N. W. 308; State v. Bockstruck, 136 Mo. 335; 38 S. W. 317; State v. Dairy Co., 62 O. S. 350; 57 N. E. 62.

¹⁴ State v. Myers, 42 W. Va. 822; 57 Am. St. Rep. 887; 35 L. R. A. 844; 26 S. E. 539.

¹⁵ Powell v. Pennsylvania, 127 U. S. 678.

¹⁶ Schollenberger v. Pennsylvania, 171 U. S. 1. (Involving the same statute as that in Powell v. Pennsylvania, 127 U. S. 678.)

¹⁷ Plumley v. Massachusetts, 155 U. S. 462.

¹⁸ Collins v. New Hampshire, 171 U. S. 30.

¹⁹ Otis v. Parker, 187 U. S. 606; Parker v. Otis, 130 Cal. 322; 92 Am. St. Rep. 56; 62 Pac. 571, 927.

²⁰ State v. Cook, 107 Tenn. 499; 62 L. R. A. 174; 64 S. W. 720.

²¹ Walp v. Mooar, 76 Conn. 515; *sub nomine*, Walp v. Lamkin, 57 Atl. 277; Squire v. Tellier, — Mass. —; 69 N. W. 312; Neas v. Borches, 109 Tenn. 398; 97 Am. St. Rep. 851; 71 S. W. 50. *Contra*, Miller v. Crawford, 70 O. S. 207; 71 N. E. 631.

§1785. Statutes concerning insurance.

Statutes requiring a copy of the application to be attached to the insurance policy,¹ or providing that in case of a total loss in fire insurance, the entire amount stipulated in the policy shall be paid,² or providing that the falsity of a representation should not avoid a policy of insurance unless wilfully false and material,³ or providing that suicide should be no defense to a policy of life insurance, unless intended when the policy was taken out,⁴ or forbidding any defense to be made if based on a covenant in the policy printed in type less than a certain size,⁵ or forbidding a covenant in an insurance policy limiting the time in which to sue on the policy,⁶ or providing that no action should be brought on a policy of insurance for ninety days after the loss,⁷ are all held valid.

§1786. Statutes concerning assumption of liability for negligence.

Statutes which forbid an employe to agree to assume certain risks which the law places upon the employer are valid.¹

¹ *Considine v. Ins. Co.*, 165 Mass. 462; 43 N. E. 201.

² *Orient Ins. Co. v. Daggs*, 172 U. S. 557; affirming *Daggs v. Ins. Co.*, 136 Mo. 382; 58 Am. St. Rep. 638; 35 L. R. A. 227; 38 S. W. 85; *Havens v. Ins. Co.*, 123 Mo. 403; 45 Am. St. Rep. 570; 26 L. R. A. 107; 27 S. W. 718; *Ins. Co. v. Leslie*, 47 O. S. 409; 9 L. R. A. 45; 24 N. E. 1072; *Ins. Co. v. Bachler*, 44 Neb. 549; 62 N. W. 911; *Ins. Co. v. Bean*, 42 Neb. 537; 47 Am. St. Rep. 711; 60 N. W. 907; *Dugger v. Ins. Co.*, 95 Tenn. 245; 28 L. R. A. 796; 32 S. W. 5; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45; 33 S. W. 992; *Reilly v. Ins. Co.*, 43 Wis. 449; 28 Am. Rep. 552; *Assurance Co. v. Meyer*, 9 Tex. Civ. App. 7; 29 S. W. 93.

³ *John Hancock, etc., Ins. Co. v. Warren*, 181 U. S. 73; affirming 59

O. S. 45; 51 N. E. 546; see § 150.

⁴ *Knights' Templars', etc., Co. v. Jarman*, 104 Fed. 638; 44 C. C. A. 93; affirming *Jarman v. Indemnity Co.*, 95 Fed. 70.

⁵ *Dupuy v. Ins. Co.*, 63 Fed. 680.

⁶ *Karnes v. Ins. Co.*, 144 Mo. 413; 46 S. W. 166; and see to the same effect, *Small v. Ins. Co.*, 51 Fed. 789; *Massachusetts, etc., Co. v. Hale*, 96 Ga. 802; 23 S. E. 849; *North American Ins. Co. v. Brim*, 111 Ind. 281; 12 N. E. 315; *Dolbier v. Ins. Co.*, 67 Me. 180; *Johnson v. Ins. Co.*, 1 N. D. 167; 45 N. W. 799.

⁷ *Christie v. Ins. Co.*, 82 Ia. 360; 48 N. W. 94.

¹ *Groves v. Wimborne* (1898), 2 Q. B. 402; *Baddeley v. Earl Granville*, L. R. 19 Q. B. Div. 423; *Naramore v. Ry.*, 96 Fed. 298; 48 L. R. A. 68; 37 C. C. A. 499; *Davis*

Statutes forbidding a corporation to make contracts with its employees whereby they agree in case of personal injury and they will either insist on their claims for personal injury and waive all right to aid from relief insurance, or will accept relief from the relief department of such corporation and waive claims for personal injuries are generally held invalid.²

§1787. Statutes restricting right to engage in business.

Statutes forbidding persons to act as insurance brokers,¹ as for foreign insurers,² or as itinerant vendors,³ without a license, have been held valid. On the other hand, statutes forbidding persons to act as horseshoers,⁴ without a license have been held invalid. Statutes restricting the business of insurance to corporations have been held valid,⁵ while similar statutes have been held invalid as to banking.⁶

§1788. Statutes making breach of contract a crime.

Statutes making it a crime to break a contract to farm on shares or perform labor after supplies have been advanced thereunder,¹ or to sell personalty subject to a landlord's lien,² or to refuse to pay an account for board,³ have been held valid, as not amounting to imprisonment for debt.

Coal Co. v. Polland, 158 Ind. 607; 92 Am. St. Rep. 319; 62 N. E. 492; Durant v. Mining Co., 97 Mo. 62; 10 S. W. 484; Greenlee v. Ry., 122 N. C. 977; 65 Am. St. Rep. 734; 41 L. R. A. 399; 30 S. E. 115; Kilpatrick v. Ry., 74 Vt. 288; 93 Am. St. Rep. 887; 52 Atl. 531.

² Shaver v. Pennsylvania Co., 71 Fed. 931. *Contra*, Pittsburg, etc., Ry. v. Montgomery, 152 Ind. 1; 49 N. E. 582.

¹ Hooper v. California, 155 U. S. 648; Commonwealth v. Roswell, 173 Mass. 119; 53 N. E. 132.

² People v. Gay, 107 Mich. 422; 20 L. R. A. 464; 65 N. W. 292.

³ State v. Harrington, 68 Vt. 622; 34 L. R. A. 100; 35 Atl. 515.

⁴ Bessette v. People, 193 Ill. 334; 56 L. R. A. 558; 62 N. E. 215.

⁵ Commonwealth v. Vrooman, 164 Pa. St. 306; 44 Am. St. Rep. 603; 25 L. R. A. 250; 30 Atl. 217.

⁶ State v. Scougal, 3 S. D. 55; 44 Am. St. Rep. 756; 15 L. R. A. 477; 51 N. W. 858.

¹ State v. Easterlin, 61 S. C. 71; 39 S. E. 250; State v. Chapman, 56 S. C. 420; 76 Am. St. Rep. 557; 34 S. E. 961.

² State v. Hoskins, 106 Tenn. 430; 61 S. W. 781.

³ Chauncey v. State, 130 Ala. 71;

§1789. Other statutory restrictions.

Statutes which forbid the transaction of certain kinds of business on Sunday are valid.¹ Statutes limiting the rate of interest which may be contracted for are valid,² and accordingly a statute limiting the rate at which a banker can discount paper has been upheld.³ Statutes regulating the sale of patent-rights are valid,⁴ and a state statute requiring a vendor of a patent right to file a copy of his letters patent with the clerk of the court before selling such rights has been upheld.⁵

§1790. Effect on theory of illegality of doctrines discussed in this chapter.

The principles discussed in this chapter are of the utmost importance as affecting the doctrine of illegality. A contract to perform an act forbidden by statute is illegal.¹ This implies, however, that the written law is a valid one; that it is within the powers of the legislative body which enacted it. Accordingly, if a statute exists which appears to make the subject-matter of the contract either void or illegal, the further question remains for consideration whether it is within the power of the legislature to withdraw from the sphere of contract that subject-matter concerning which it has attempted to forbid the parties to contract.

89 Am. St. Rep. 17; 30 So. 403; (citing *Ex parte* King, 102 Ala. 182; 15 So. 524; and distinguishing Carr v. State, 106 Ala. 35; 54 Am. St. Rep. 17; 34 L. R. A. 634; 17 So. 350); State v. Kingsley, 108 Mo. 135; 18 S. W. 994.

¹ See Ch. XXVII.

² See Ch. XXVIII.

³ Youngblood v. Savings Co., 95 Ala. 521; 36 Am. St. Rep. 245; 20 L. R. A. 58; 12 So. 579.

⁴ See § 332.

⁵ Reeves v. Corning, 51 Fed. 774.

¹ See § 329 *et seq.*

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 DAMAGES; PUBLIC CONTRACTS; RAILROAD COMPANY;
 REMEDY; RESTRAINT OF ALIENATION; RESTRAINT OF
 MARRIAGE; RESTRAINT OF TRADE; REVENUE STAMP;
 SWITCH; TAXATION; TELEGRAPH COMPANY; TRADE
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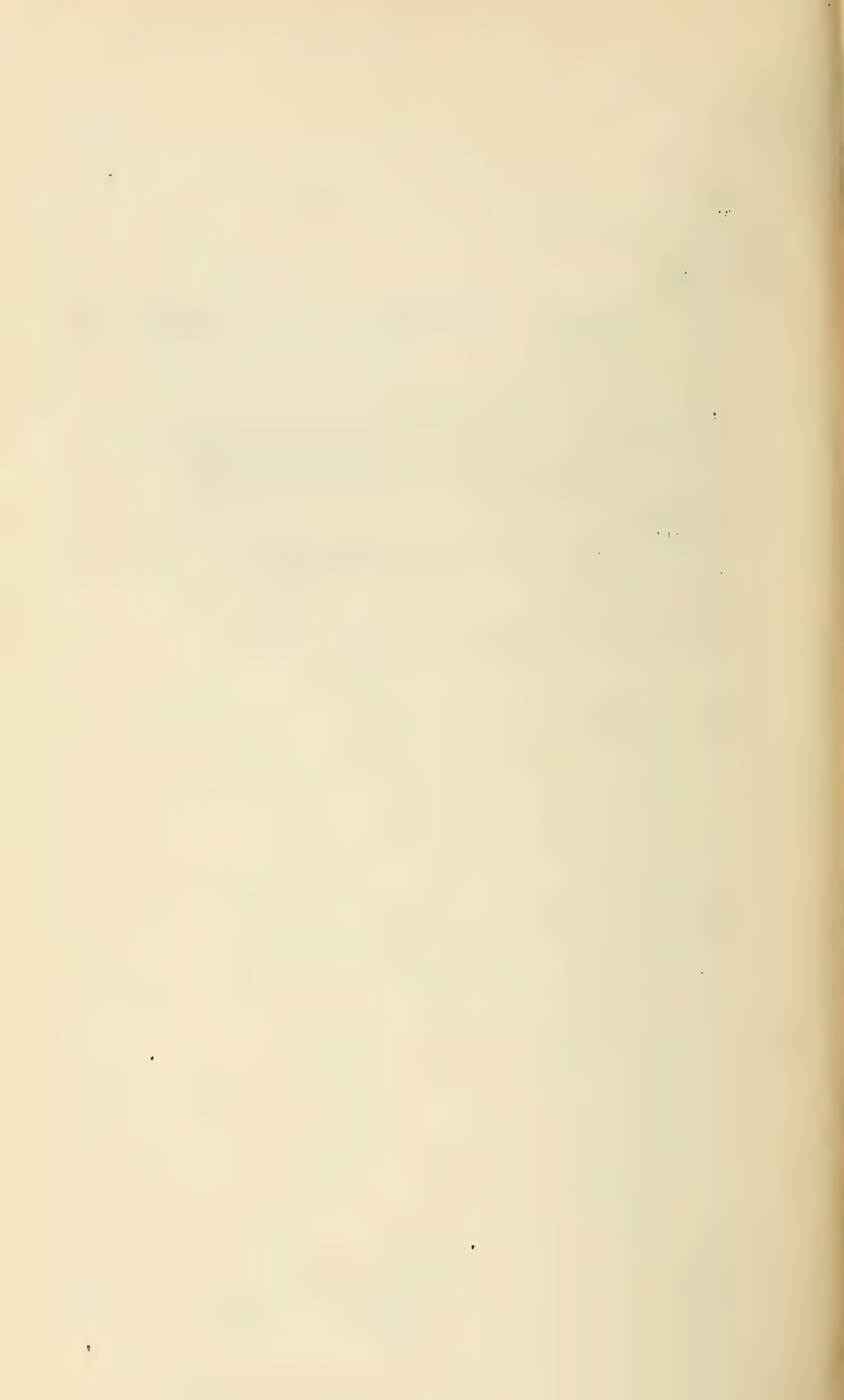
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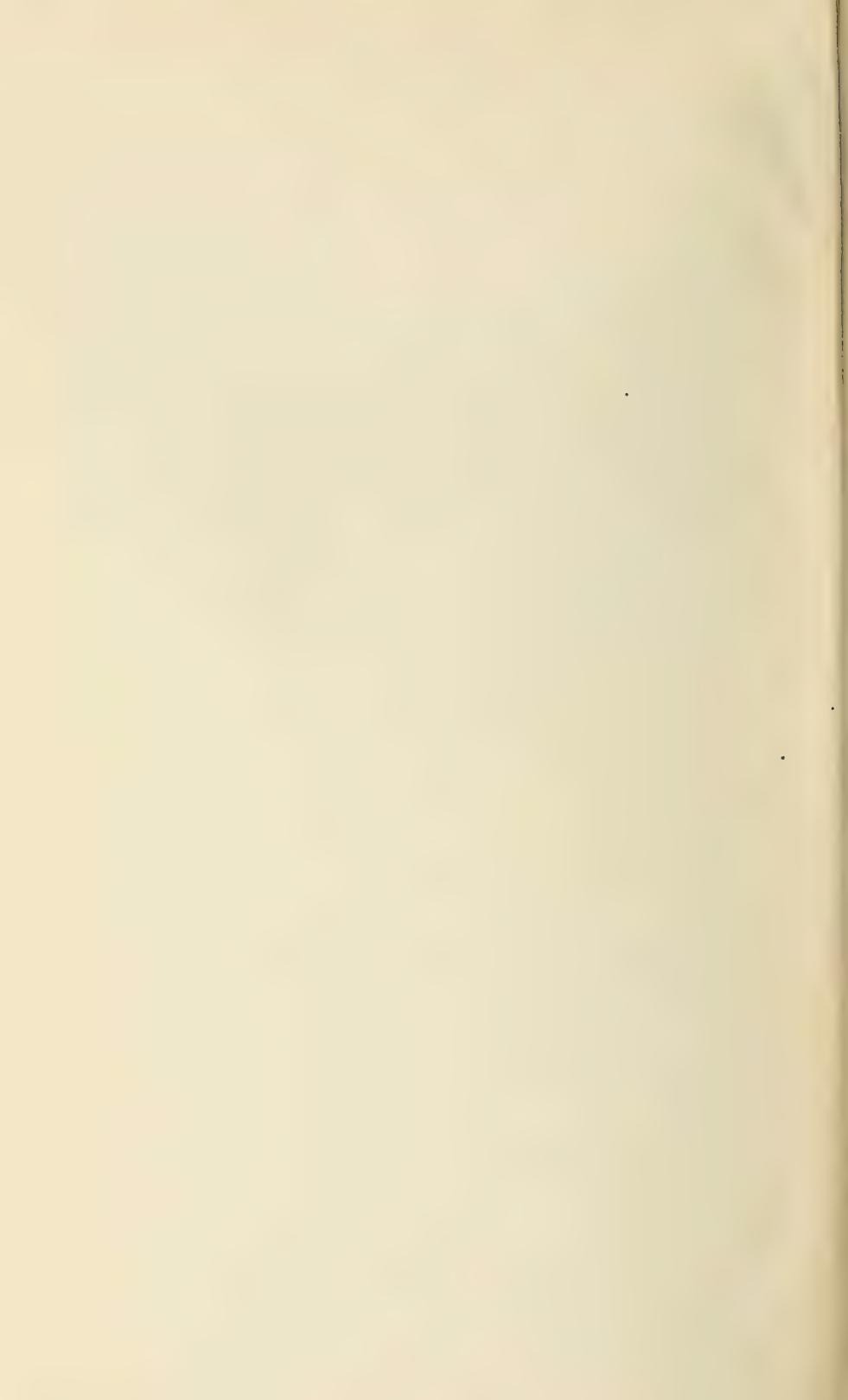
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